No. 1

Supreme Court, U.S.
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In The
Supreme Court of the United States

DEJA VU OF NASHVILLE, INC., a Tennessee corporation, and MERONEY ENTERTAINMENT, INC., a Tennessee corporation,

Petitioners,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX VOLUME I, PAGES 1 TO 217

BRADLEY J. SHAFER
(Counsel of Record)
ANDREA E. PRITZLAFF
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906
517-886-6560
Counsels for Petitioners

MICHAEL F. PLEASANTS
PLEASANTS LAW FIRM
8 South Third, Suite 200
Memphis, Tennessee 38103
901-572-7332
Co-Counsel for Petitioners

January 31, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. When attempting, pursuant to *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), to "cast direct doubt" upon a municipality's purported rationale and justification for the enactment of a speech-restrictive law, may a plaintiff take discovery on the question of whether the challenged regulation furthers an important or substantial governmental interest? In a published opinion, the Sixth Circuit answered: "No."

2. In light of the highly-fractured and plurality nature of this Court's three most recent opinions concerning the "secondary effects" doctrine, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), and *Alameda Books*, which has engendered significant confusion in the lower courts, should this Court revisit the evidentiary standards and burdens under that doctrine?

3. In a case where a district court converts a preliminary injunction into a permanent injunction and final judgment without further adjudication and without conducting a trial on the merits in regard to the plaintiff's challenges to the constitutionality of a municipal ordinance, and where the permanent injunction/final judgment is later vacated, is the plaintiff then entitled to litigate the merits of his or her claims?

LIST OF PARTIES BELOW/PARENT COMPANIES AND NON WHOLLY OWNED SUBSIDIARIES (PURSUANT TO RULE 14.1(B))

The parties to the Sixth Circuit action below were: Deja Vu of Nashville, Inc., Michael Rucker, Michael Butler, Meroney Entertainment, Inc. d/b/a Ken's Gold Club, The Pleasure Palace, Inc., Dawn Pierce, and Elizabeth Martz (Appellants); and Metropolitan Government of Nashville and Davison County, Tennessee (Appellee).

Petitioner Deja Vu of Nashville, Inc., states that its parent corporation is Dynamic Industries, Ltd., a Delaware (non-public) corporation. There is no publicly held company owning 10% or more of the stock of Deja Vu of Nashville, Inc.

Petitioner Meroney Entertainment, Inc., states that it has no parent corporation. There is no publicly held company owning 10% or more of the stock of Meroney Entertainment, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Deja Vu of Nashville, Inc. (*"Deja Vu"*) and Meroney Entertainment, Inc. (*"Ken's Gold Club"*), respectfully pray that a writ of certiorari be issued to review the amended ruling of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 12, 2006.

OPINIONS BELOW

The Judgment and amended opinion of the United States Court of Appeals for the Sixth Circuit is reported as *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 466 F.3d 391 (6th Cir. 2006) (App. 1-15); the original opinion was unreported and appears at App. 16-29; and an earlier opinion of the Sixth Circuit was reported at 274 F.3d 377 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073 (2002) (App. 30-77). The district court's opinions and orders are unreported, and include an Order and Memorandum granting the Plaintiffs' second motion for preliminary injunction (App. 149-201); an Order modifying the preliminary injunction into a permanent injunction and granting final judgment to the Plaintiffs (App. 202-03); and a memorandum and order vacating the permanent injunction and granting final judgment. (App. 207-16).

Other orders of the district court and the Magistrate Judge are discussed below.

JURISDICTION

Pursuant to a timely filed motion for panel rehearing, the Sixth Circuit entered an amended opinion on October 12, 2006. It subsequently denied the motion for rehearing in an order dated November 3, 2006. App. 217. This petition is filed within 90 days of that date and, in any event, Justice Stevens granted an extension to file this petition until February 1, 2007. This Court therefore has jurisdiction to review the amended ruling of the Sixth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The text of the First Amendment to the United States Constitution is found at App. 218, and the Fourteenth Amendment is reproduced at App. 219-20. In addition, the provisions of 42 U.S.C. § 1983 are found at App. 221.

Chapter 6.54 of the Metropolitan Code of Laws (the ordinance scheme underlying Plaintiffs' challenges below) has undergone numerous changes during the pendency of this litigation. It was originally enacted by Bill No. 097-796 (App. 226-91), and the current version of the Ordinance incorporating numerous amendments is found at App. 292-351.

STATEMENT OF THE CASE

The proceedings below arose out of actions commenced pursuant to 42 U.S.C. § 1983, which challenged the constitutionality of an ordinance adopted by the Metropolitan

Government of Nashville and Davidson County, Tennessee ("Metro"), generally known as Chapter 6.54 ("Ch. 6.54," or simply the "Ordinance"). The Ordinance requires the licensing of, and otherwise further regulates, certain "adult" businesses and individuals associated with them, and the original version thereof was enacted through the adoption of Bill No. 097-796 on August 19, 1997, which is found at App. 226-91.

Through the enactment of Ch. 6.54, Metro has devised what appears to be a one-of-a-kind licensing gauntlet through which applicants must pass in order to be able to engage in protected expression. They must apply to, and appear in public before, the "Sexually Oriented Business Licensing Board" (here, simply the "Board") comprised of political appointees selected by the Mayor. § 6.54.020(B)(1) (App. 299).

On October 17, 1997, before individuals and businesses were required to submit applications for licenses, the Plaintiffs (Petitioners here) and others filed suit seeking to have Ch. 6.54 enjoined and declared unconstitutional, and submitted contemporaneously therewith a motion for preliminary injunction limited to a claim that the Ordinance failed to contain the requisite procedural guarantees mandated by *Freedman v. Maryland*, 380 U.S. 51 (1965). Pursuant thereto, the Honorable John T. Nixon[1] entered an order enjoining Ch. 6.54 in its entirety. App. 78-98.

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[1] Over nine years, the district court proceedings have been handled by four judges. Because the Sixth Circuit claims that certain matters "slipped through the cracks" as this case was repeatedly reassigned (App. 13), Plaintiffs will identify the actions of the district judges using their names.

Following the enactment of amendments to Ch. 6.54 and the adoption by the Tennessee legislature of a "judicial review" statute (T.C.A. § 27-9-111(e), found at App. 222-23), Metro filed a motion to dissolve the preliminary injunction, which the district court granted. App. 131-48. Plaintiffs appealed that ruling

The Plaintiffs then filed a second motion for preliminary injunctive relief that, at the insistence of Metro and pursuant to court order (App. 129), included therein all of the other constitutional challenges that they desired to litigate by way of preliminary injunction proceedings. Plaintiffs were not, of course, required in that limited submission to bring forth all of their claims against the Ordinance – irrespective of whether they were ripe for adjudication at the preliminary injunction stage – and they did not. Significantly, Plaintiffs did not at that time ask the court to consider its claim that there was an insufficient "secondary effects" basis for the enactment of the Ordinance, nor did Plaintiffs fully litigate their assertion that Ch. 6.54 vested the licensing authorities with unbridled discretion[2] in that discovery had not been completed and much of the governmental conduct that supported the contention did not take place until *after* the preliminary injunction hearing.

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[2] Following the lifting of the first preliminary injunction, Judge Nixon took senior status and the case was reassigned to the Honorable Althea Trauger. Shortly thereafter, however, Judge Trauger recused herself when she came to understand that Plaintiffs' challenges would include an attack upon the political appointee makeup of the licensing Board, and as a result of her husband being personal counsel to the Mayor and the fact that she had personal knowledge of the criteria that the Mayor used for appointing members to such boards. App. 363-65. The case was then assigned to the Honorable Thomas A. Higgins.

No secondary effects challenge was raised at that time because the parties were then involved in a dispute regarding the discovery that Plaintiffs were entitled to take on that issue. Chapter 6.54 was purportedly adopted out of a concern of the "adverse secondary effects" of adult entertainment establishments (App. 228-36, at Section 1(B) ("Findings")), and Plaintiffs' challenge thereto was raised at an early scheduling conference, with the resulting Case Management Order stating:

> Limited discovery will be needed in the following areas:
>
> * * *
>
> b. Documents, studies or other evidence filed with the Metropolitan Council or any committees thereof relating to its consideration of Metropolitan ordinance No. 097-796, *including secondary effects of adult entertainment establishments and any nexus between the Ordinance and perceived secondary effects.*

App. 100-01 (emphasis added).

Pursuant to this order, Plaintiffs propounded document requests (App. 382-89) and served Defendants with a "Notice of Depositions of Representatives of the Metropolitan Government of Nashville and Davidson County" pursuant to Fed.R.Civ.P. Rule 30(b)(6). This notice consisted of thirty-nine specified areas – many of which involved "secondary effects" matters – that the Plaintiffs desired to investigate. App. 374-81. Metro agreed to produce deponents for inquiries 1-4, 20, 34 and 37.

However, the Defendants filed a motion for protective order objecting to the remainder of the notice. With one limited exception permitting only the access to certain

documents (regarding Request 32, which sought a *deponent* to testify about certain criminal statistics), the Magistrate Judge granted the Defendants' motion for protective order (App. 111-27), and precluded the Plaintiffs from being able to investigate both the purported "secondary effects" of adult entertainment facilities in Nashville and any evidence that the government had in regard to whether and how the regulations as contained in Ch. 6.54 would alleviate those problems. The Plaintiffs filed a motion with the district court to review the decision of the Magistrate, but Judge Higgins never ruled on that motion – either before considering the second motion for preliminary injunction or before entering final judgment.

The second motion for preliminary injunction was litigated in a three-day evidentiary hearing between April 13 and 15, 1999. At no time prior to the conclusion of that proceeding did Judge Higgins ever provide notice, or otherwise indicate, that he was combining the hearing on the preliminary injunction motion with a trial on the merits as is permitted by Fed.R.Civ.P. Rule 65(a)(2). Following the evidentiary hearing, but before the district court ruled on the motions, Metro enacted fifty-two additional changes to Ch. 6.54.

Irrespective of the evidentiary hearing, however, because Judge Nixon had previously vacated the first preliminary injunction, the Plaintiffs were then required to apply for licenses under the Ordinance. These administrative proceedings, which occurred *subsequent* to the preliminary injunction hearing, were anything but "ministerial." For example, at the April 27, 1999, meeting of the Board, *Deja Vu*'s application for a license was denied in part because the application inspection "indicates that the couches need to be cleaned. Sanitation of the floors and

cubicles need to be improved. Covered waste containers need to be provided throughout the establishment. The commode in the dressing room needs to be cleaned. And the shower stall in the dressing room needs to be cleaned. . . ."[3] Additionally, the Board discussed the fact that another inspection found that "the dancers were in violation of the '3-foot rule.'"[4] App. 390-91. Based on these subjective criteria, the Board voted unanimously to deny the license application. *See* App. 392. Other licenses were denied for similar, discretionary reasons.[5]

Moreover, the Board members could not even *agree* on whether various licenses should be issued. In fact, some licenses were "*granted*" merely because there was not a *majority* vote to *deny* them. For example, *Deja Vu* requested an evidentiary hearing regarding the denial of its license application, during which a motion to approve a

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[3] In fact, the inspection that ultimately served as a basis for the Board to deny *Deja Vu*'s application was a "health inspection" that – probably not coincidently – occurred at a lunch break during the district court preliminary injunction hearing. Immediately thereafter, Mike Rucker, the then-general manager of *Deja Vu*, re-took the witness stand to testify about the health inspection that had just taken place and a *general* health inspection the club had undergone *only eight days before* where it received a "score" of *99 out of 100*; the only "gig" being for a broken floor tile behind the bar. During the earlier inspection, *none* of the concerns noted by the inspector on the day of the court hearing were even *raised* by the health inspector. App. 405-08.

[4] Section 6.54.140(C) precludes dancing within "three feet" of a customer, but does not indicate how that distance is to be measured.

[5] The transcript of the April 27, 1999, Board meeting illustrates licenses being denied for such subjective reasons as not having clean walls and clean storage areas (App. 392-93), not eliminating "all unnecessary items on lower level" (App. 393), not having clean showers and not eliminating storage that may attract rodents and insects (App. 394), and not having "tight fitting lids or covers" on all garbage containers (App. 396).

license failed for lack of a "second." App. 414-15. A subsequent motion to *deny* the application received *two votes in favor of denial and two votes against denial*. App. 415-17. Yet, the written decision by the Board stated that although no vote favored granting the license, the license would nevertheless be granted. App. 420-21. In any event, the license was *granted* because there was a *2-2 tie* in the voting to *deny* the application.[6] And, even the director of the Department of Codes administration, Terry Cobb, expressed his frustration at the way the Board was continually adopting new rules and regulations and definitions, commenting that "this seems up to this point to be a constantly changing process, what – *the meaning of words change on an ongoing basis. . . .*" App. 418-19 (emphasis added).

Separate from these administrative "proceedings," Judge Higgins granted the second motion for preliminary injunction and enjoined the Ordinance in its entirety. App. 149-201. Later, he conducted a status conference to prepare the case for trial, and expressed his frustration at the seemingly never-ending array of amendments to the Ordinance. App. 425-26, 434. Judge Higgins then suggested that he might simply issue an order converting the preliminary injunction into a permanent injunction and final judgment (App. 426), to which both sides objected. *See, e.g.*, App. 426-37. Nevertheless, Judge Higgins later entered an order modifying the preliminary injunction into a permanent injunction and granting final judgment in

[6] *Deja Vu*'s license was not the only one that received a split vote by the Board Members. *Ken's Gold Club* received a license on a two-to-one vote. App. 414. In fact, that establishment had its application previously *denied* on a two-to-one vote. App. 412.

favor of the Plaintiffs. App. 202-03. Chapter 6.54 was permanently enjoined in its entirety.

Following the enactment of additional amendments to Ch. 6.54, Metro appealed the order granting the permanent injunction, and the Plaintiffs cross-appealed. Those appeals were consolidated with Plaintiffs' appeal of Judge Nixon's ruling lifting the first preliminary injunction.

The Sixth Circuit issued an opinion on December 6, 2001, affirming in part and reversing in part, but maintaining the injunction in place. *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377 (6th Cir. 2001) ("*Deja Vu I*"), *cert. denied* 535 U.S. 1073 (2002). App. 30-77. In regard to a portion of Plaintiffs' appeal concerning the Magistrate Judge's discovery ruling, the Sixth Circuit declined to address the propriety of that order "before the district court has had a chance to review it." *Id.* at 403. And, by that time, Judge Higgins had taken senior status, and the case had been reassigned to the Honorable Todd Campbell.

In light of the various rulings of the Sixth Circuit, Metro enacted an additional series of amendments to Ch. 6.54, with the revised codified version of the Ordinance appearing at App. 292-351. In addition, the Tennessee legislature adopted *conditional* revisions to T.C.A. § 27-9-111(e), which were to take effect, however, only in the event that this Court denied Metro's petition for a writ of certiorari on the judicial review issue. *See, e.g.*, App. 224-25. Metro did, indeed, file a petition for a writ of certiorari in this Court, which was denied on May 13, 2002. 535 U.S. 1073 (2002).

Two years later, this Court rendered its ruling in *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S.

774 (2004). On February 25, 2005, which was over eight months following the ruling in *Z.J. Gifts* – but five years and one month after Ch. 6.54 was amended to purportedly correct the constitutional deficiencies noted by the Sixth Circuit in *Deja Vu I*, and two years and nine months from the date that the amendments to T.C.A. § 27-9-111(e) went into effect (that being as of this Court's denial of Metro's petition for a writ of certiorari) – Metro filed a motion to lift the permanent injunction predicated, in part, upon this Court's ruling in *Z.J. Gifts*.

While Metro did not cite any specific court rule as the basis for its motion, Plaintiffs responded by arguing that in addition to the untimeliness of the motion, lifting the permanent injunction would have the consequent effect of vacating the judgment, which in turn would place the district court proceeding in the position of having been litigated through the preliminary injunction process – thereby permitting the Plaintiffs to move forward with the other challenges that they had to the constitutionality of Ch. 6.54 but which had not been included as part of their second motion for preliminary injunction (such as the "secondary effects" challenge and certain aspects of their "unbridled discretion" argument). Plaintiffs also pointed out that if the court was inclined to vacate the judgment, it would then have to address the Magistrate's ruling relating to the secondary effects discovery dispute that the Sixth Circuit, in *Deja Vu I*, had specifically indicated should be first addressed by the district court.

Nevertheless, Judge Campbell entered an order not only vacating the permanent injunction, but also *reentering* final judgment (this time *against* the Plaintiffs), thereby precluding the Plaintiffs from ever having a trial on the merits. App. 207-16. The Plaintiffs appealed and on

June 22, 2006, the Sixth Circuit entered an opinion affirming the decision below. App. 16-29 ("*Deja Vu II*"). In that ruling, the appellate court concluded that Judge Campbell's entry of final judgment was appropriate because the Plaintiffs had litigated all of their claims as part of their second motion for preliminary injunction, including their "secondary effects" attack. App. 27-29.

The Plaintiffs timely filed a motion for panel rehearing and provided the Sixth Circuit with an index of the briefing on the second motion for preliminary injunction (App. 366-73), the testimony submitted in support thereof, as well as the proposed findings of fact and conclusions of law submitted by the Plaintiffs below *prior* to the commencement of the evidentiary hearing; all of which established beyond any question that Plaintiffs had not even *raised* a secondary effects challenge as part of their second motion for preliminary injunction, let alone litigated such a claim at the hearing. All that occurred at the preliminary injunction hearing in regard to the secondary effects issue was that Metro submitted, without objection, the "evidence" that it claimed to have relied on when enacting Chapter 6.54. App. 402-03, 409.

The Sixth Circuit then issued an amended opinion on October 12, 2006, once again affirming the district court. *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 466 F.3d 391 (6th Cir. 2006) ("*Deja Vu III*"). App. 1-15. The reasoning, however, changed. Now, the Sixth Circuit stated that the Plaintiffs were precluded from litigating their secondary effects challenge for two reasons. First, in his ruling on the second motion for preliminary injunction (subsequently converted into the permanent injunction), Judge Higgins had discussed the secondary effects justification for the

Ordinance. Second, further litigation was unnecessary because Plaintiffs were precluded from undertaking any discovery on the secondary effects issue. App. 12-14. And, on November 3, 2006, the Sixth Circuit entered an Order denying the motion for rehearing. App. 217.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. THE HIGHLY-FRACTURED NATURE OF THIS COURT'S PLURALITY OPINIONS REGARDING THE "SECONDARY EFFECTS" DOCTRINE HAS LED TO SIGNIFICANT CONFUSION IN THE LOWER COURTS.

In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court declared that the enactment of zoning ordinances directed at "adult" businesses could be justified by the "secondary effects" of such establishments. These laws would be declared constitutional if they were "designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* at 47. Since *Renton*, however, this Court's decisions regarding the application, and indeed expansion, of the "secondary effects" doctrine have comprised of a trio of highly-fractured plurality opinions: *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) ("*Pap's II*"); and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

The pluralities in *Barnes* and *Pap's II* determined that the constitutionality of nudity prohibitions should be evaluated pursuant to the intermediate scrutiny test for symbolic speech set forth in *United States v. O'Brien*, 391

U.S. 367 (1968), which analyzed: 1) Whether the regulation at issue is within the government's constitutional power; 2) whether the regulation furthers an important or substantial governmental interest; 3) whether the governmental interest is unrelated to the suppression of free expression; and 4) whether the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. *Id.* at 377. Yet, lower courts have had great difficulty in discerning how these three plurality rulings are to be applied.

In attempting to employ the test of *Marks v. United States*, 430 U.S. 188, 193 (1977) (the "holding" of a plurality decision "may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds"), a number of courts have recently devoted entire portions of their opinions just trying to decipher what these split decisions mean. *See, e.g., Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1259-64 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 717-22 (7th Cir. 2003); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 860-64 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003); and *Commonwealth v. Jameson*, ___ S.W.3d ___, 2006 WL 3386489 (Ky. Nov. 22, 2006), at **10-17. *See also Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998) ("*Pap's I*") (attempting to determine the holding of *Barnes*). And, courts have also noted the difficulty in applying *Marks* to these decisions when there is no one opinion that can be considered to express the consensus of a majority of Justices. *See, e.g., Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994). This has resulted in conflicting rulings below in regard to both the government's

burden of justifying such laws and the type of evidence that is necessary to successfully challenge such claims.

As noted by this Court in regard to the governmental interest prongs of *Renton/O'Brien*, before enacting a secondary effects-based law a city or state need not conduct new studies or produce evidence independent of that already generated by other municipalities in regard to such perceived problems, "so long as whatever ***evidence*** the [government] relies upon is ***reasonably believed to be relevant*** to the problem that [it] addresses." *Renton*, 475 U.S. at 51-52 (clarification and emphasis added). But, how a court determines if this standard is met is not self-apparent.

In fact, in rejecting – as a result of this confusing body of case law – this Court's secondary effects jurisprudence as a basis for interpreting its State's free speech rights, the Pennsylvania Supreme Court observed that it is "notable that the five Justices in the U.S. Supreme Court [in *Pap's II*] who agreed that the *O'Brien* test applied ***could not agree upon the precise evidentiary showing which would be required to satisfy that test***." *Pap's A.M. v. City of Erie*, 812 A.2d 591, 609-10 (Pa. 2002) ("*Pap's III*") (clarification and emphasis added). *See also Heideman v. South Salt Lake City*, 348 F.3d 1182, 1197 (10th Cir. 2003) ("The standards for the *quantity and nature* of the empirical evidence needed to uphold a city ordinance based on the negative secondary effects of sexually oriented speech in general, or nude dancing in particular, are *continuing to evolve*") (emphasis added).

The conflict concerning a litigant's ability to challenge the governmental interest claims underlying a secondary effects-based law is the most problematic. The theoretical

right to mount such an attack is clearly established. *Pap's II* noted that the business challenging the law there had been given "ample opportunity to contest the [city] council's findings about secondary effects – before the council itself, throughout the state proceedings, and before this Court." *Pap's II*, 529 U.S. at 298 (clarification added). Later, in *Alameda Books*, the plurality observed – after noting that *Renton* had not set an *initial* high evidentiary bar for municipalities when attempting to justify such laws – that:

> This is not to say that a municipality can get away with *shoddy data or reasoning*. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to ***cast direct doubt*** on this rationale, ***either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings***, the municipality meets the standard set forth in *Renton*.

Alameda Books, 535 U.S. at 438-39 (emphasis added).

However, respectfully, this Court has provided no clear guidance on how a plaintiff may satisfy *either* standard, which has led to conflicting opinions concerning not just the *weight* of evidence that is necessary to "cast direct doubt," but also the form of contradictory evidence that is even *relevant* to meeting these standards.

For example, in *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150, 1169 n.24 (10th Cir. 2006), the Tenth Circuit observed that the mere submission of the article Paul, *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking The Legal*

Myth of Negative Secondary Effects, 6 Communication Law and Policy No. 2 (2001), which analyzed the secondary effects reports generally relied upon by municipalities when enacting "adult" business regulations and found them to be seriously and often fatally flawed, might alone cast doubt upon a city's evidence and rationale. But in *SOB, Inc.*, 317 F.3d at 862-63, where the Eighth Circuit found that this article, *plus* testimony that an adult business that had been in operation for eight years had neither caused higher crime rates nor depressed the value of nearby properties, was insufficient. The Seventh Circuit came to basically the same conclusion in *G.M. Enter., Inc. v. Town of St. Joseph*, 350 F.3d 631, 635-36, 639 (7th Cir. 2003), *cert. denied,* 543 U.S. 812 (2004).

More to the point, in *Flanigan's Enter., Inc. v. Fulton County*, 242 F.3d 976, 986 (11th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002), *Peek-A-Boo Lounge,* 337 F.3d at 1272, and *Daytona Grand v. Daytona Beach* 410 F. Supp.2d 1173, 1184 (M.D. Fla. 2006), for example, the courts determined that expert witness testimony describing localized empirical studies that negated a connection between adverse secondary effects and "adult" businesses can indeed rebut the governmental presumption. However, other courts come to the exact opposite result when confronted with basically the same evidence. *See, e.g., G.M. Enter.*, 350 F.3d at 635-36, 639 (a local study which established that the surrounding county "[h]ad not experienced any major problems with adult entertainment establishments," an affidavit stating that property values near the club had increased over time, an affidavit which established that the majority of police calls regarding incidents at the club were generated during hours when no nude or semi-nude dance entertainment was offered, and a statement by

the local sheriff that the volume of police calls generated by the club was unrelated to nude dancing, was all irrelevant as *"[a]lthough this evidence shows that the Board might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the Board's legislative process"*); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000) (the district court *"properly rejected"* expert testimony and other evidence demonstrating that there was in fact no correlation between the plaintiff's establishment being open 24 hours a day and crime because it "merely contradicts other evidence that the Hallie Board ***could*** have reasonably relied upon"); and *Jameson*, 2006 WL 3386489, at **21-25 (Kentucky Supreme Court declaring that the "cast direct doubt" standard is a "heavy burden" to overcome, stating that *Alameda Books* does not support the conclusion that a finding of a lack of *local* secondary effects shifts the burden, and concluding that evidence in the form of testimony by a chief dispatcher of the police department showing that adult businesses were not the situs of elevated crime and a real estate agent observing that real estate values in the area of the adult businesses actually increased, was insufficient to meet the burden shifting standard[7]) (all emphasis added). *See also Gammoh v. City of La Habra*, 395 F.3d 1114, 1126 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 374 (2005) (Ninth Circuit ignored proffered expert testimony that the studies on which the

[7] The testimony submitted by *Jameson* is described in slightly greater detail in the Court of Appeals opinion found at *Jameson v. Commonwealth*, No. 2003-CA-000967-DG, 2004 Ky. App. LEXIS 229, at *29 (August 6, 2004).

city relied were "flawed and irrelevant" and did not conform to the methodological criteria suggested by the appellants' expert, as that was "simply not the law"), and *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F. Supp.2d 672, 679-80 (W.D. Ky. 2002) (evidence challenging the reliability and probativity of the reports which the city relied upon, empirical studies conducted in other municipalities that found no connection between adult uses and adverse secondary effects, and compilation of police data showing no local increase in crime, did not disprove that the enactment of the ordinance may reduce criminal activity).

The appellate courts also disagree on whether the generally relied upon secondary effects reports examining adults bookstores and live entertainment venues can be used to justify regulations of "take out" only facilities where there is no viewing of adult entertainment on the premises. *Cf. Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 293-95 (5th Cir. 2003), *cert. denied*, 540 U.S. 982 (2003), and *World Wide Video, Inc. v. City of Tukwila*, 816 P.2d 18, 21 (Wash. 1991) (they cannot); *with Z.J. Gifts, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 (10th Cir. 1998), *cert. denied*, 525 U.S. 868 (1998), and *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir. 1994), *cert. denied*, 513 U.S. 1017 (1994) (they can). And, there is even a conflict in the circuits concerning whether the secondary effects "reliance" component of *Renton* can be used to legitimize the extension of regulations so that they apply to a business that presents "adult" entertainment on only a *single* occasion. *Cf. BZAPS, Inc. v. City of Mankato*, 268 F.3d 603, 606-07 (8th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002) (yes); *with Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987) (no).

This confusion has even led at least two appellate courts to recently state that they simply "will not specify the methodological standards to which [a litigant's] evidence must conform" in order to successfully challenge the stated secondary effects basis for the enactment of a speech-restrictive law. *See City of Chicago v. Pooh Bah Enter., Inc.*, ___ N.E.2d ___, 2006 WL 2827608 at *20 (Ill. Oct. 5, 2006); and *Gammoh*, 395 F.3d at 1126 (clarifications added).

The decision of the Sixth Circuit, which forecloses even *discovery* on these critical issues, is the culmination of the confusion wrought by the lack of majority consensus by the Justices of this Court in regard to this doctrine. Demonstrating this discord is the plain fact that subsequent to and irrespective of the Sixth Circuit's discovery ruling in *Deja Vu III*, district courts outside of the Sixth Circuit are ignoring that decision and are continuing to allow discovery on these important matters. *See* App. 438-50 (Rule 30(b)(6) deposition notice, transcript and ruling on a motion for clarification/reconsideration of a protective order, where the district court ultimately permitted the requested discovery pursuant to a deposition notice virtually identical to the one at issue here (App. 374-81), and where the court even declined to hear argument on the applicability of *Deja Vu III* (App. 446-47)); and App. 463-68 (district court also ordering the taking of a Rule 30(b)(6) deposition).

The protection of First Amendment rights from governmental erosion warrants clearer direction from this Court on these evidentiary standards, and this petition should, therefore, be granted.

II. THE LACK OF CLARITY FROM THIS COURT HAS RESULTED IN A BODY OF DECISIONS THAT RENDER IT VIRTUALLY IMPOSSIBLE TO CHALLENGE A PURPORTED SECONDARY EFFECTS JUSTIFICATION FOR A LAW THAT RESTRICTS PROTECTED EXPRESSION.

The Sixth Circuit's "no discovery" ruling – which even eviscerates the discovery that Metro *agreed* to provide – virtually ensures that a litigant will be unable to "cast direct doubt" upon a government's rationale for enacting a secondary effects-based law. Simply put, a litigant cannot "cast doubt upon" the government's rationale if it cannot discern what that rationale is.[8] But, that cannot be accomplished absent discovery, and the inability to "cast direct doubt" without such discovery is guaranteed because of the highly-fractured nature of *Barnes* and the fact that Justice Souter's concurrence is generally considered to be the "holding" of that decision.

In Justice Souter's view, a governmental interest need not be identified at the time of the enactment of a regulation, but may be established later during litigation. *Barnes*, 501 U.S. at 582 ("Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a ***current*** governmental interest in the service of which the challenged application may be constitutional") (Souter, J.,

[8] Here, the Rule 30(b)(6) deposition notice requested a witness to testify about these alleged governmental interests. App. 376-80 (No.'s 1-17, 23-29, 32 and 33).

concurring) (emphasis added). Utilizing *Marks*, numerous courts adopt this precept.[9]

Accordingly, without being able to undertake discovery in order to at least determine what secondary effects the government contends substantiate the enactment – ***or continued existence*** – of a particular regulation, a plaintiff can appropriately "cast doubt upon" the secondary effects as may be articulated in a bill's legislative preambles but nevertheless find himself or herself losing the constitutional challenge when another secondary effect is used in litigation to justify the law. *See, e.g., SOB, Inc.*, 317 F.3d at 862-63 (Eighth Circuit describing the limited governmental concerns in the legislative preambles, and ignoring submitted studies of crime and property values because the plaintiffs' "local evidence addressed only two adverse secondary effects, property values and crime in the vicinity of an adult entertainment establishment. These are issues particularly relevant to zoning. A ban on live nude dancing, on the other hand, ***may address*** other adverse secondary effects, such as the likelihood that an establishment whose dancers and customers routinely violate long-established standards of public decency will

[9] *See, e.g.*, the earlier ruling of the Sixth Circuit in this case in *Deja Vu I*, 274 F.3d at 394 n.4 (appellate court coming up with its own justification for a license disclosure provision even though it did not comport with the "codified" reason for that requirement set forth in the challenged ordinance). *See also Mitchell v. Comm'n on Adult Entertainment Establishments of Delaware*, 10 F.3d 123, 136-37 (3rd Cir. 1993); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 515 (4th Cir. 2002); *Fantasy Ranch, Inc. v. City of Arlington, Texas*, 459 F.3d 546, 560 (5th Cir. 2006); *DiMa Corp.*, 185 F.3d at 829-30; *Farkas v. Miller*, 151 F.3d 900, 905 (8th Cir. 1998); *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1284-285 (10th Cir. 2002), *cert. denied*, 537 U.S. 947 (2002); and *Jameson*, 2006 WL 3386489 at * 11.

foster illegal activity such as drug use, prostitution, ***tax evasion and fraud***"[10]); and *World Wide Video of Wash., Inc. v. City of Spokane*, 368 F.3d 1186, 1190, 1195 (9th Cir. 2004) (adult business zoning ordinance challenged with evidence that included a declaration – together with supporting data – that the adult businesses in Spokane neither contributed to the depreciation of property values nor resulted in increased calls for police service, with the Ninth Circuit concluding that the plaintiff had not succeeded in "casting direct doubt" because ***litter*** was a sufficient governmental justification for the enactment of the ordinances in question[11]) (all emphasis added).

In addition, even if the primary governmental interest was a purported concern of crime, the ruling of the Sixth Circuit is broad enough so that a municipality could refuse, in discovery, to provide ***raw crime data*** to a litigant looking to analyze the same in order to attempt to "cast doubt upon" the government's purported rationale for enacting a speech-restrictive law. That would, indeed, be ironic given the fact that of the thirty-nine areas of inquiry of the 30(b)(6) deposition notice at issue here, the *only* one where the Magistrate Judge permitted even limited discovery (No. 32) concerned crime data. App. 111, 124-25.

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[10] *But cf., J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 374 (5th Cir. 1998) (Fifth Circuit concludes that there was no reason to believe that the consideration of certain secondary effects for the adoption of a zoning ordinance was relevant to the enactment of an anti-nudity provision).

[11] But decisions of this Court seem to cast doubt upon whether "litter" can be used as a basis to suppress expression. *See Schneider v. New Jersey*, 308 U.S. 147, 162 (1939); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-09 (1984); and *Ward v. Rock Against Racism*, 491 U.S. 781, 800 n.7 (1989).

Without such information, it would be virtually impossible for a plaintiff to either demonstrate that "the municipality's evidence does not support its rationale" or to "furnish [] evidence that disputes the municipality's factual findings." *Alameda Books*, 535 U.S. at 438-39.

In such a circumstance, the claim of adverse secondary effects being the basis for the enactment of speech-restrictive laws becomes irrefutable, irrebuttable, and incontestable. That could not have been the intent behind this Court's rulings in *Pap's II* and *Alameda Books*, and this petition should therefore be granted to provide clarification on these issues.

III. THE SIXTH CIRCUIT'S OPINION PERMITS THE GOVERNMENT TO WITHHOLD THE TRUTH AND TO ENACT SPEECH-RESTRICTIVE REGULATIONS BASED UPON FALSEHOODS AND "SHODDY DATA OR REASONING."

The Sixth Circuit's opinion subverts the rules of evidence, which are supposed to be applied "to the end that the truth may be ascertained and the proceedings justly determined." F.R.E. Rule 102. But even before that "no discovery" ruling, the lack of clarity of this Court's secondary effects doctrine was leading appellate courts to explicitly conclude that the *truth* simply does not matter in these type of challenges.[12] These ominous jurisprudential

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[12] *See DiMa Corp.*, 185 F.3d at 831 ("*DiMa*'s contradictory evidence would be highly probative *if our task were to discover the objective truth about the effect of* [the plaintiff] *operating in Hallie. But our task under the First Amendment is far different*") (emphasis and clarification added). *See also Jameson*, 2006 WL 3386489, at *21 (". . .it is *irrelevant* whether the local government is *actually wrong* regarding the extent of

(Continued on following page)

developments permit the government to impermissibly suppress disfavored – but nevertheless protected – expression. This is because "adult" businesses do not necessarily engender "adverse secondary effects." Judicial decisions have reached this conclusion,[13] as have a number of recent peer-reviewed journal articles.[14]

Most telling in regard to this concern is the Eleventh Circuit decision in *Flanigan's Enterprises*, where a *police study* had concluded that there was no correlation between adult entertainment establishments and crime; a real estate analysis commissioned by adult businesses found no decrease in real estate values; and that latter finding was confirmed by the county's own real estate appraiser. 242 F.3d at 979-80. Based upon *that* evidence, the Eleventh Circuit declared that it was not reasonable for Fulton County to "rely on remote, foreign studies concerning secondary effects when the County's *own current, empirical data* conclusively demonstrated that such studies were

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all the secondary effects that have actually occurred or may occur in the future") (emphasis added).

[13] *See, e.g., Peek-A-Boo Lounge*, 337 F.3d at 1268; *Flanigan's Enterprises*, 242 F.3d at 986; and *Erie Boulevard Triangle Corp. v. City of Schenectady*, 250 F.Supp.2d 22, 32 (N.D.N.Y. 2003).

[14] *See, e.g., An Examination of the Assumption That Adult Businesses Are Associated With Crime In Surrounding Areas: A Secondary Effects Study In Charlotte, North Carolina*, 38 Law & Society Review, No. 1 (2004); and Linz, *Peep Show Establishments, Police Activity, Public Place and Time: A Study of Secondary Effects in San Diego, California*, 43 The Journal of Sex Research 182 (2006) (this publication even containing a methodological critique thereof and a response). *See also* Enriquez, *A Legal and Empirical Perspective of Crime and Adult Establishments: A Secondary Effects Study in San Antonio, Texas*, 15 Am. U.J. Gender Soc. Pol'y & L. 1 (2006) (non-peer reviewed published study that found no connection between crime rates and live entertainment "adult" businesses).

not relevant to local conditions." *Id.* at 986 (emphasis added). However, given the Sixth Circuit's ruling at issue here, the Fulton County police study could have been "buried" by governmental officials, and the truth might never have seen the light of a federal courtroom.[15]

Flanigan's Enterprises is not the only case where discovery has disclosed governmental-held evidence demonstrating a lack of connection between "adult" businesses and secondary effects. In Lakewood, Washington, the city uncovered the "depressing statistic" that there was absolutely no demonstrated connection between crime rates and adult entertainment establishments. App. 451.[16] The city officials then conducted secret proceedings in an effort to "find" secondary effects, and subsequently enacted a comprehensive regulatory ordinance of adult businesses. Finding the conduct of the city to have been improper, the Ninth Circuit reversed a lower

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[15] These concerns are not hypothetical. After losing its initial battle, Fulton County conducted a three-year police analysis of crime rates and adult businesses in order to justify a *new* ordinance, which similarly concluded that there was no connection. Yet, the county attempted to "hide" this report. In denying Fulton County's motion for summary judgment on *that* ordinance, the district court stated that it was "somewhat troubled by the fact that it appears that this report was withheld from the plaintiffs until less than one week prior to the date on which the vote on the ordinance was scheduled." App. 458. And, that report was ***not*** considered by the county board at the meeting during which the plaintiffs had an opportunity to present their arguments. *Id.* These circumstances are summarized in the subsequent opinion found at *Flanigan's Enter., Inc. v. Fulton County*, 2006 WL 2927532 (N.D. Ga. Oct. 12, 2006).

[16] Undated memorandum of David Bugher, Community Development Director for the City of Lakewood, Washington, to Daniel Held, City Attorney for the City of Lakewood, Washington, disclosed in discovery in the case of *Byran Clark v. City of Lakewood*, Case No. C98-5341 RJB (W.D. Wash.).

court decision dismissing a constitutional challenge against that ordinance. *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001).

Another example illustrating how the lack of discovery can subvert the legal process is found in the case of *D. Russo, Inc. v. Township of Union, New Jersey*, Superior Court of New Jersey Law Divisions: Docket No. UNN-L-2313-06, where an ordinance preamble cited various secondary effects studies as the justification for the enactment of that law, but the legislative record *contained no such materials*. In an effort to then determine what the commissioners actually relied upon (in furtherance of *Renton*) to enact that ordinance, the trial court permitted limited discovery in that regard. App. 460-61.

Moreover, city council members are permitted to testify in *support* of the constitutionality of an ordinance. *See, e.g., R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 406 (7th Cir. 2004). Yet, under the Sixth Circuit's decision, those challenging the constitutionality of a regulation would be precluded from deposing those city council members prior to the time that they testify at trial.

The preclusion of a plaintiff being able to take discovery on this secondary effects issue also permits municipalities to enact speech-restrictive laws based upon "shoddy data or reasoning" in violation of *Alameda Books*. An example of this can be found in *H&A Land Corp. v. City of Kenndale, Texas*, 2005 WL 723690 (N.D. Tex. March 29, 2005), where the district court concluded that an informal survey of real-estate appraisers prepared by Kenndale's lawyer was "shoddy" – and could not therefore be used as the basis for the enactment of the regulation at

issue – predicated upon the court's analysis of the legal counsel's answers to questions at deposition.[17] *Id.* at ** 6-7.

If plaintiffs can be precluded from undertaking discovery of the purported secondary effects justification for the enactment of a speech-related restriction, the government can rely upon any "shoddy data or reasoning" that it wants and no one will be able to prove otherwise. The writ should, therefore, be granted.

IV. THIS COURT SHOULD PROTECT THE RIGHT OF A LITIGANT TO HAVE HIS OR HER CLAIMS DETERMINED ON THE MERITS.

The decision of the Sixth Circuit upholding the dismissal of Plaintiffs' claims violated their right to a trial on the merits and is in conflict with the decisions of this Court and at least one other circuit.

It is without question that a moving party is not required to bring forth all of its arguments and proofs at a preliminary injunction hearing. *See, e.g., Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("A party . . . *is not required to prove his case in full* at a preliminary injunction hearing. . . . [A] preliminary injunction is customarily granted on the basis of procedures that are less formal and *evidence that is less complete* than in a trial on the merits.") (emphasis added) (internal citations omitted). An exception occurs when the preliminary injunction hearing is combined with a trial on the merits pursuant to

[17] While the district court decision does not specifically state that the deficiencies of the study were uncovered upon examination of the deposition testimony of the municipality's legal counsel, the limine brief found at App. 469-76 demonstrates this.

Fed.R.Civ.P. Rule 65(a)(2). However, that exception did not occur in this case. Under the circumstances that occurred here, Plaintiffs were deprived of their right to a full trial on the merits of *all* of their claims.

In addition, the decision of the Sixth Circuit is in direct conflict with the Ninth Circuit's decision in *Baby Tam & Co. v. City of Las Vegas*, 199 F.3d 1111 (9th Cir. 2000) ("*Baby Tam II*"). *Baby Tam II* and the present case share astoundingly similar substance and procedural history.[18] The critical difference appears when, in *Baby Tam II*, the Ninth Circuit axiomatically instructs: "By winning the [permanent injunction] on the first appeal, Baby Tam did not abandon its other constitutional objections to the facial validity of the municipal ordinance. The City is mistaken in supposing that those issues are no longer part of this case and no longer before us." *Id.* at 1114. Where the Ninth Circuit protects a plaintiff's due process rights, the challenged ruling of the Sixth Circuit does not.

Here, Plaintiffs were *never* permitted to litigate their claims concerning their "secondary effects" challenge, the discretionary nature of the Ordinance as demonstrated by administrative proceedings that occurred ***after*** the sole

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[18] In both challenges to "adult" business regulations, plaintiffs' motions for preliminary injunction ultimately resulted in the issuance of permanent injunctions. *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1102-103 (9th Cir. 1998) ("*Baby Tam I*"); *Deja Vu I*, 274 F.3d at 403. Both circuits instructed the district courts to maintain the injunction until the constitutional deficiencies were corrected. *Baby Tam I*, 154 at 1102-103; *Deja Vu I*, 274 F.3d at 403. Both injunctions were dissolved after the municipality purportedly corrected the ordinances' constitutional deficiencies identified in the injunction. *Baby Tam II*, 199 F.3d at 1114; *Deja Vu II*, 466 F.3d at 395.

evidentiary hearing in this case, or the politically controlled Board so central to this licensing scheme (among others). In order to protect the fundamental right to a trial and to resolve this circuit conflict, this petition should be granted.

CONCLUSION

For the reasons set forth above, Plaintiffs/Petitioners respectfully request this Honorable Court grant the petition for a writ of certiorari.

Dated: January 31, 2007.

Respectfully submitted,

BRADLEY J. SHAFER
(Counsel of Record)
ANDREA E. PRITZLAFF
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906
517-886-6560
Counsels for Petitioners

MICHAEL F. PLEASANTS
PLEASANTS LAW FIRM
8 South Third, Suite 200
Memphis, Tennessee 38103
901-572-7332
Co-Counsel for Petitioners

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466 F.3d 391

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Deja Vu of Nashville, Inc., *et al.*,

Plaintiffs-Appellants,

v.

Metropolitan Government of Nashville & Davidson County,

Defendant-Appellee.

No. 05-5895

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
Nos. 97-01066; 97-01176 –
Todd J. Campbell, District Judge.

Argued: June 6, 2006

Decided and Filed: October 12, 2006

Before: MARTIN, MOORE, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: Bradley J. Shafer, SHAFER & ASSOCIATES, Lansing, Michigan, for Appellants. Francis H. Young, METROPOLITAN DEPARTMENT OF LAW, Nashville, Tennessee, for Appellee. **ON BRIEF:** Bradley J. Shafer, Andrea E. Pritzlaff, SHAFER & ASSOCIATES, Lansing, Michigan, Michael F. Pleasants, Memphis, Tennessee, for Appellants. Francis H. Young, James L. Charles, METROPOLITAN DEPARTMENT OF LAW, Nashville, Tennessee, for Appellee.

AMENDED OPINION

BOYCE F. MARTIN, JR., Circuit Judge. This case has been before this Court several times. *See Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County,* 274 F.3d 377 (6th Cir. 2001) [hereinafter *Deja Vu I*]. Last time it was here, the Court remarked that "'deja vu' provides a particularly appropriate label for this second appeal." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County,* 421 F.3d 417, 418 (6th Cir. 2005) [hereinafter *Deja Vu II*]. This time, it's "like deja vu all over again." YOGI BERRA, *available at* http://www.quotationspage.com/quote/27218.html (last accessed June 20, 2006); *see also* JOHN FOGERTY, *Deja Vu (All Over Again), on* DEJA VU ALL OVER AGAIN (Geffen Records 2004). Before us now is Deja Vu's appeal from the district court's decision dissolving a permanent injunction which had enjoined the enforcement of Metropolitan Code of Laws Chapter 6.54 "Sexually Oriented Businesses" ("the Ordinance"), and dismissing the case. The issue on appeal is whether it was proper for the district court to have done so. We AFFIRM.

I.

There is quite a history to this case. It has been described extensively in this Court's previous opinions, *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County,* 274 F.3d 377 (6th Cir. 2001) [hereinafter *Deja Vu I*], and *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County,* 421 F.3d 417, 418 (6th Cir. 2005) [hereinafter *Deja Vu II*]. In short, the Metro Nashville government enacted Chapter 6.54 on August 19, 1997. It required "sexually oriented" businesses to obtain licenses and performers to obtain permits. Deja Vu sought

to enjoin the Ordinance by arguing that it was unconstitutional for not providing prompt judicial review. The district court agreed, and on December 8, 1997, entered a preliminary injunction. The government amended the Ordinance and, approximately one year later, the injunction was dissolved. In response, on December 17, 1998, Deja Vu filed a second motion for a preliminary injunction. The government responded by notifying the court of ninety-two amendments to the Ordinance since it was enacted. The district court granted Deja Vu's motion on October 4, 1999, enjoining enforcement of the Ordinance in its entirety. Shortly thereafter, following a hearing on December 21, 1999, the preliminary injunction was converted into a permanent injunction.

The government amended the Ordinance and at the same time appealed to this Court. In *Deja Vu I,* this Court affirmed the district court's decision enjoining enforcement of the amended Ordinance, holding that the judicial review provision, *i.e.,* Tennessee's common law writ of certiorari, was constitutionally inadequate and that the statutory definition of "sexually oriented" was overly broad. The Supreme Court denied certiorari, 535 U.S. 1073, at which time additional amendments of the Ordinance went into effect. The amendments narrowed the definition of "sexually oriented," and the State altered the common law writ to require prompt judicial review in First Amendment cases. On February 23, 2005, the government filed a motion to dissolve the permanent injunction. The government argued that the Ordinance is now constitutional under *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.,* 541 U.S. 774 (2004), and complied with *Deja Vu I. See Deja Vu I,* 274 F.3d at 403 ("Upon remand, the district court should maintain the injunction until Metropolitan

Nashville satisfies it that the constitutional problems with the Ordinance's definition of 'sexually oriented' and its judicial review procedures have been corrected."). The district court agreed with the government and entered an Order dissolving the injunction on April 29, 2005. The court found that the amended definition of "sexually oriented" "is not overbroad and complies with the First Amendment."[1] Further, the court found that the judicial review provision "does guarantee prompt judicial review as required by the First Amendment," and "Metro has satisfied this Court that the constitutional problems with its judicial review procedures have been corrected."[2] The district court further concluded that the previous injunction hearing had been consolidated with a trial on the merits, and therefore further litigation, if it were to occur,

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[1] The Ordinance now defines "sexually oriented" as follows:

> "Sexually oriented" when used to modify film, movie, motion picture, videocassette, slides, or other photographic reproductions shall mean a film, movie, motion picture, videocassette, slides, or other photographic reproductions that regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing "specified sexual activities or specified anatomical areas" offered for observation by the patron(s) on the premises of a sexually oriented business.

Metro Code of Laws § 6.54.010(Y).

[2] The relevant statute now provides:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall immediately grant the writ of certiorari, and shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari.

Tenn. Code Ann. § 27-9-111(e).

would need to be the result of the filing of a new case by Deja Vu. Nine days prior to the district court's decision dissolving the injunction, this Court heard oral argument in *Deja Vu II,* which involved the district court's award of attorney fees to Deja Vu. This is how it stood when this Court affirmed the district court's award of $536,535.22 in attorney fees in *Deja Vu II.* The appeal from the district court's order dissolving the permanent injunction is now before this Court. Deja Vu essentially makes two arguments. First, it argues that the district court improperly dissolved the injunction by not analyzing the issue under Federal Rule of Civil Procedure 60(b). Second, Deja Vu argues that the district court improperly dismissed the case because Deja Vu never received a trial on its claims.

II.

A. *Dissolution of the Injunction*

"A party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer 'continuing irreparable injury' for which there is no adequate remedy at law." *Women's Medical Professional Corp. v. Baird,* 438 F.3d 595, 602 (6th Cir. 2006) (quoting *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1067 (6th Cir. 1998)). In evaluating a district court's grant of a permanent injunction or dissolution of a permanent injunction previously granted, we review its factual findings for clear error and its legal conclusions de novo. *Id.* The scope of injunctive relief is reviewed under an abuse of discretion standard. *Id.*

Even before the Federal Rules of Civil Procedure were enacted, the prospective features of injunctions were subject to modification by the district court. *United States*

v. Swift & Co., 286 U.S. 106, 114 (1932) (noting that "a continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need"). Now that the Rules have been enacted, modifications or dissolution of injunctions must take place under Rule 60(b). *Rufo v. Inmates of Suffolk Jail,* 502 U.S. 367, 380 (1992) (noting that "the prospective effect of such a judgment or decree will be open to modification where deemed equitable under Rule 60(b)"). In *Rufo,* the Court held that "Rule 60(b)(5) provides that a party may obtain relief from a court order when 'it is no longer equitable that the judgment should have prospective application,' not when it is no longer convenient to live with the terms of a consent decree. Accordingly, a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id.*

Thus, "if a party seeks to have a decree set aside entirely, he or she has to show that the decree has served its purpose, and there is no longer any need for the injunction." MOORE'S FED. PRACTICE § 60.47[2][c] (3d ed. 2005); *see also Board of Education of Oklahoma City v. Dowell,* 498 U.S. 237, 247 (1991) (without referencing Rule 60(b)(5), holding that the desegregation decree should be dissolved when "the purposes of the desegregation litigation had been fully achieved"); *Nicacio v. INS,* 797 F.2d 700, 706 (9th Cir. 1985) ("[A] court which issues an injunction retains jurisdiction to modify the terms of the injunction if a change in circumstances so requires."). In *Sweeton v. Brown,* 27 F.3d 1162 (6th Cir. 1994) (en banc), this Court described a "flexible standard" having "ancient lineage in our common law," and stated that Sir Francis Bacon's "principles generally provide that a court has continuing

jurisdiction to terminate or modify an injunction and that an equitable remedy should be enforced only as long as the equities of the case require." *Id.* at 1164. In ordering the injunctions dissolved, we focused on the fact that "[t]he foundation upon which the claim for injunctive relief was built has crumbled," and concluded that "[n]o basis in federal law exists for the injunctive relief imposed in this case." *Id.* We then stated:

> Injunctions are one of the law's most powerful weapons. Ongoing injunctions should be dissolved when they no longer meet the requirements of equity. The law changes and clarifies itself over time. Neither the doctrines of *res judicata* or waiver nor a proper respect for previously entered judgments requires that old injunctions remain in effect when the old law on which they were based has changed.

Id. at 1166-67.

Consistent with these standards, in *Deja Vu I,* this Court stated that "[u]pon remand, the district court should maintain the injunction until Metropolitan Nashville satisfies it that the constitutional problems with the Ordinance's definition of 'sexually oriented' and its judicial review procedures have been corrected." 274 F.3d at 403. Following the government's motion to dissolve the injunction, the district court held that the constitutional problems with the Ordinance had been rectified.[3] We agree.

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[3] It is unclear to us why the district court stated that this Court's dictate to maintain the injunction until the constitutional problems were resolved, "makes Plaintiffs' Rule 60 argument meritless." It appears that the district court then essentially applied the standards from Rule 60(b)(5) – which is what this court's "dictate" instructed the

(Continued on following page)

1. Prompt Judicial Review

The Tennessee statute that modified the discretionary common law writ of certiorari now states:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall immediately grant the writ of certiorari, and shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari.

Tenn. Code Ann. § 27-9-111(e). Following the Supreme Court's decision in *Z.J. Gifts,* the judicial review statute clearly complies with the First Amendment's requirement of a prompt judicial decision. In *Z.J. Gifts,* the Supreme Court found that "Colorado's ordinary 'judicial review' rules offer adequate assurance, not only that *access* to the courts can be promptly obtained, but also that a judicial *decision* will be promptly forthcoming." 541 U.S. at 781 (emphases in original); *see also id.* at 782 ("[O]rdinary court procedural rules and practices, in Colorado as elsewhere, provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm."). Thus, "the First Amendment does not require special 'adult business' judicial review rules." *Id.* This holding, of course, applies where an ordinance "does not seek to

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district court to do. The district court's statement notwithstanding, it properly went on to conclude that maintenance of the injunction should no longer have prospective application, which is consistent with Rule 60(b)(5).

censor material," but rather is a licensing scheme that "applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display." *Id.* at 783; *see also Deja Vu of Cincinnati, L.L.C. v. Union Township Bd. of Trustees,* 411 F.3d 777, 787-88 (6th Cir. 2005) (en banc). The licensing and permit criteria, M.C.L. § 6.54.050, 6.54.080, are reasonably objective, nondiscretionary criteria, such that the more relaxed standard of *Z.J. Gifts* would apply as opposed to the more stringent standard from *Freedman v. Maryland,* 380 U.S. 51 (1965). *See Deja Vu of Cincinnati,* 411 F.3d at 787 (noting that the Court in *Freedman* was confronted with a statute employing subjective standards where a denial of a license would likely result in complete censorship and concluding that *Freedman's* "special judicial review rules" do not apply to adult business licensing schemes).[4] Thus, pursuant to this standard, the government's expedited review provision complies with the First Amendment.

2. Definition of "Sexually Oriented"

In *Deja Vu I,* we held that the Ordinance's definition of "sexually oriented" was unconstitutionally overbroad. 274 F.3d at 387. "A law is overbroad under the First Amendment if it 'reaches a substantial number of impermissible applications' relative to the law's legitimate

[4] Even if we were to conclude that *Freedman* still applied to Metro Nashville's Ordinance, the Ordinance is still constitutional. Here, there are "special judicial review" rules with respect to First Amendment cases that will guarantee a prompt judicial decision. Thus, the Ordinance passes constitutional muster under both *Z.J. Gifts* and *Freedman.*

sweep." *Id.* (quoting *New York v. Ferber,* 458 U.S. 747, 771 (1982)). As this Court has noted, the doctrine is designed "to prevent the chilling of future protected expression." *Id.* (citation omitted).

The definition reviewed in *Deja Vu I* defined "sexually oriented" as "any exhibition of any motion pictures, films, or videos depicting 'specified sexual activities' or 'specified anatomical areas.'" M.C.L. § 6.54.070(Y) (1999) (amended). "'Specified anatomical areas'" included '[l]ess than completely and opaquely covered' buttocks and female breasts." *Deja Vu I,* 274 F.3d at 377 (quoting M.C.L. § 6.54.010(BB)). Based on these definitions, this Court concluded that "any movie or video featuring a single shot of a person's nude or partially-covered buttocks or a woman's partially covered breast is a 'sexually oriented' film under the Ordinance, irrespective of whether the film's content constitutes 'adult entertainment' or causes the type of secondary effects . . . that Metropolitan Nashville seeks to regulate." *Id.* at 377-78. Thus, "[b]ecause this definition could apply to a range of expression that does not cause the secondary effects that the Ordinance was aimed to prevent, it is overbroad." *Id.* at 388.

Since this Court's ruling in *Deja Vu I,* the definition of "sexually oriented" has been amended and is now considerably narrower. It now reads:

> "Sexually oriented" when used to modify film, movie, motion picture, videocassette, slides, or other photographic reproductions shall mean a film, movie, motion picture, videocassette, slides, or other photographic reproductions that regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing "specified sexual activities or

> specified anatomical areas"[5] offered for observation by the patron(s) on the premises of a sexually oriented business.

Metro Code of Laws § 6.54.010(Y).

The definition of "sexually oriented business," which was not found to be constitutionally infirm in *Deja Vu I,* states: "Any commercial establishment which for a fee or incidentally to another service, regularly presents material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' as defined in this section for observations by patrons therein." M.C.L. § 6.54.010(Z). In *Deja Vu I,* we noted that if this definition stood alone, it would be overbroad, as it would include a hotel that offers its guests access to an adult cable channel, but found that the Ordinance avoided this problem by having four additional subsections, one of which must be satisfied, in order to fall within the Ordinance. These four subsections define "sexually oriented bookstore," "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented video store." M.C.L. § 6.54.010(Z)(1)-(4). Thus, we held that the requirement of being a "sexually oriented business" "narrows the Ordinance's application to those theaters that regularly present material distinguished or characterized by an emphasis on sex acts or particular body parts. Again, reading the definitions together saves the parts from overbreadth." *Deja Vu I,* 274 F.3d at 388.

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[5] The definition of "specified sexual activities" includes sexual intercourse and fondling of buttocks or breast. *See* M.C.L. § 5.43.010(CC).

The government took its cue from this decision by narrowing its definition of "sexually oriented" to require that the activities be "offered for observation by the patron(s) on the premises of a sexually oriented business." M.C.L. § 6.54.010(Y). The definition was also narrowed such that it no longer applies to "*any* exhibition of *any* motion pictures, films, or videos depicting 'specified sexual activities' or 'specified anatomical areas'" M.C.L. § 6.54.010(Y) (1999) (amended) (emphases added), but rather, now applies only to those that "regularly depict material which is distinguished or characterized by an emphasis on matter depicting or describing 'specified sexual activities or specified anatomical areas.'" M.C.L. § 6.54.010(Y). The district court found that these two amendments cured the constitutional infirmities. We agree. None of this Court's concerns from *Deja Vu I* remain under the current definition. The definition means that only those activities that regularly depict specified sexual activities or anatomical areas and that occur on the premises of a sexually oriented business will be regulated. Our previous concerns involving, as an example, a hotel that offers its guests an adult cable channel, no longer remain under this narrowed language. Moreover, Deja Vu did not discuss overbreadth in its final brief or reply brief or allege that the definition was still unconstitutional.

B. Dismissal of the Case

Deja Vu also argues that it was improper for the district court to dismiss the case because Deja Vu never received a trial on the merits of its constitutional challenges. In 1999, however, the district court entered a permanent injunction following a hearing on December 21. Unless disputed questions of material fact exist, no trial or

evidentiary hearing is necessary for the district court to enter a permanent injunction. *United States v. McGee,* 714 F.2d 607, 613 (6th Cir. 1983).

The district court's memorandum and analysis with regard to Deja Vu's motion for a preliminary injunction was incorporated into the district court's order making the preliminary injunction permanent. In that memorandum, the district court addressed what appears to be all of Deja Vu's challenges to the Ordinance, leaving no unresolved issues of fact that would necessitate a trial. Deja Vu disagrees, arguing that it was not able to litigate its "secondary effects" challenge because the district court never addressed its motion seeking review of a magistrate judge's decision to enter a protective order that insulated Metro from discovery regarding secondary effects.

From the record, it appears that Deja Vu is correct that the district court never explicitly addressed its motion, which apparently slipped through the cracks as the district court's different judges resolved different motions for injunctions addressing different iterations of the Ordinance. Nonetheless, this oversight is immaterial for two reasons. First, the district court's memorandum granting Deja Vu's preliminary injunction concluded that Metro enacted the ordinance "to promote the health, safety, morals and general welfare of the citizens of Metropolitan Nashville Davidson County," which effectively mooted Deja Vu's discovery motion. Second, and more fundamentally, Deja Vu is not entitled to discovery regarding secondary effects. We have followed the Supreme Court in deferring to local governments' conclusions regarding whether and how their ordinances address adverse secondary effects of adult-oriented establishments. It is clear, for instance, that a local government

does not need localized proof of adverse secondary effects in order to regulate adult establishments. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 411 (6th Cir. 1997) (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582-84 (1991) (Souter, J., concurring in the judgment)). Similarly, all that is needed to justify a regulation is a reasonable belief that it will help ameliorate such secondary effects. *Deja Vu of Cincinnati, L.L.C. v. Union Township Bd. of Trustees*, 411 F.3d 777, 790 (6th Cir. 2005) (en banc) (quoting *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir. 1998)). Deja Vu offers no authority entitling it to undermine this deference through discovery.

III.

For the foregoing reasons, we AFFIRM the district court's order dissolving the permanent injunction and dismissing the case.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05-5895

DEJA VU OF NASHVILLE, INC., *et al.*

Plaintiffs-Appellants,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY, TENNESSEE,

Defendants-Appellee.

Before: MARTIN, MOORE, and ROGERS, Circuit Judges.

JUDGMENT

(Filed Oct. 12, 2006)

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's order dissolving the permanent injunction which had enjoined the enforcement of Metropolitan Code of Laws Chapter 6.54 "Sexually Oriented Businesses" and dismissing the case is AFFIRMED.

**ENTERED BY ORDER
OF THE COURT**

/s/ Leonard Green
Leonard Green, Clerk

2006 WL 1716720

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

No. 05-5895

UNITED STATES COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

DEJA VU OF NASHVILLE, INC., *et al.*,

Plaintiffs-Appellants,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY,

Defendant-Appellee. /

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

(Filed June 22, 2006)

Before: MARTIN, MOORE, and ROGERS, Circuit Judges.

BOYCE F. MARTIN, JR., Circuit Judge. This case has been before this Court several times. *See Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 274 F.3d 377 (6th Cir. 2001) [hereinafter *Deja Vu I*]. Last time it was here, the Court remarked that " 'deja vu' provides a particularly appropriate label for this second appeal." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 421 F.3d 417, 418 (6th Cir. 2005) [hereinafter *Deja Vu II*]. This time, it's "like deja vu all over again." YOGI BERRA, *available at* http://www.quotationspage.com/quote/27218.html (last accessed June 20, 2006); *see also* JOHN FOGERTY, *Deja Vu (All Over Again)*, *on* DEJA VU ALL OVER AGAIN (Geffen Records 2004). Before us now is Deja Vu's appeal from the district

court's decision dissolving a permanent injunction which had enjoined the enforcement of Metropolitan Code of Laws Chapter 6.54 "Sexually Oriented Businesses" ("the Ordinance"), and dismissing the case. The issue on appeal is whether it was proper for the district court to have done so. We AFFIRM.

I.

There is quite a history to this case. It has been described extensively in this Court's previous opinions, *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 274 F.3d 377 (6th Cir. 2001) [hereinafter *Deja Vu I*], and *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 421 F.3d 417, 418 (6th Cir. 2005) [hereinafter *Deja Vu II*]. In short, the Metro Nashville government enacted Chapter 6.54 on August 19, 1997. It required "sexually oriented" businesses to obtain licenses and performers to obtain permits. Deja Vu sought to enjoin the Ordinance by arguing that it was unconstitutional for not providing prompt judicial review. The district court agreed, and on December 8, 1997, entered a preliminary injunction. The government amended the Ordinance and, approximately one year later, the injunction was dissolved. In response, on December 17, 1998, Deja Vu filed a second motion for a preliminary injunction. The government responded by notifying the court of ninety-two amendments to the Ordinance since it was enacted. The district court granted Deja Vu's motion on October 4, 1999, enjoining enforcement of the Ordinance in its entirety. Shortly thereafter, following a hearing on December 21, 1999, the preliminary injunction was converted into a permanent injunction.

The government amended the Ordinance and at the same time appealed to this Court. In *Deja Vu I*, this Court affirmed the district court's decision enjoining enforcement of the amended Ordinance, holding that the judicial review provision, *i.e.*, Tennessee's common law writ of certiorari, was constitutionally inadequate and that the statutory definition of "sexually oriented" was overly broad. The Supreme Court denied certiorari, 535 U.S. 1073, at which time additional amendments of the Ordinance went into effect. The amendments narrowed the definition of "sexually oriented," and the State altered the common law writ to require prompt judicial review in First Amendment cases. On February 23, 2005, the government filed a motion to dissolve the permanent injunction. The government argued that the Ordinance is now constitutional under *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), and complied with *Deja Vu I*. *See Deja Vu I*, 274 F.3d at 403 ("Upon remand, the district court should maintain the injunction until Metropolitan Nashville satisfies it that the constitutional problems with the Ordinance's definition of 'sexually oriented' and its judicial review procedures have been corrected."). The district court agreed with the government and entered an Order dissolving the injunction on April 29, 2005. The court found that the amended definition of "sexually oriented" "is not overbroad and complies with the First Amendment."[1] Further, the court found that the judicial

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[1] The Ordinance now defines "sexually oriented" as follows:

"Sexually oriented" when used to modify film, movie, motion picture, videocassette, slides, or other photographic reproductions shall mean a film, movie, motion picture, videocassette, slides, or other photographic reproductions that regularly depicts material which is distinguished or characterized by an

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review provision "does guarantee prompt judicial review as required by the First Amendment," and "Metro has satisfied this Court that the constitutional problems with its judicial review procedures have been corrected."[2] The district court further concluded that the previous injunction hearing had been consolidated with a trial on the merits, and therefore further litigation, if it were to occur, would need to be the result of the filing of a new case by Deja Vu. Nine days prior to the district court's decision dissolving the injunction, this Court heard oral argument in *Deja Vu II*, which involved the district court's award of attorney fees to Deja Vu. This is how it stood when this Court affirmed the district court's award of $536,535.22 in attorney fees in *Deja Vu II*. The appeal from the district court's order dissolving the permanent injunction is now before this Court. Deja Vu essentially makes two arguments. First, it argues that the district court improperly dissolved the injunction by not analyzing the issue under Federal Rule of Civil Procedure 60(b). Second, Deja Vu

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emphasis on matter depicting or describing "specified sexual activities or specified anatomical areas" offered for observation by the patron(s) on the premises of a sexually oriented business.

Metro Code of Laws § 6.54.010(Y).

[2] The relevant statute now provides:

If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court shall immediately grant the writ of certiorari, and shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari.

Tenn. Code Ann. § 27-9-111(e).

argues that the district court improperly dismissed the case because Deja Vu never received a trial on its claims.

II.

A. Dissolution of the Injunction

"A party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer 'continuing irreparable injury' for which there is no adequate remedy at law." *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006) (quoting *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998)). In evaluating a district court's grant of a permanent injunction or dissolution of a permanent injunction previously granted, we review its factual findings for clear error and its legal conclusions de novo. *Id.* The scope of injunctive relief is reviewed under an abuse of discretion standard. *Id.*

Even before the Federal Rules of Civil Procedure were enacted, the prospective features of injunctions were subject to modification by the district court. *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) (noting that "a continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need"). Now that the Rules have been enacted, modifications or dissolution of injunctions must take place under Rule 60(b). *Rufo v. Inmates of Suffolk Jail*, 502 U.S. 367, 380 (1992) (noting that "the prospective effect of such a judgment or decree will be open to modification where deemed equitable under Rule 60(b)"). In *Rufo*, the Court held that "Rule 60(b)(5) provides that a party may obtain relief from a court order when 'it is no longer equitable that the judgment should have prospective application,'

not when it is no longer convenient to live with the terms of a consent decree. Accordingly, a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id.*

Thus, "if a party seeks to have a decree set aside entirely, he or she has to show that the decree has served its purpose, and there is no longer any need for the injunction." MOORE'S FED. PRACTICE § 60.47[2][c] (3d ed.2005); *see also Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237, 247 (1991) (without referencing Rule 60(b)(5), holding that the desegregation decree should be dissolved when "the purposes of the desegregation litigation had been fully achieved"); *Nicacio v. INS*, 797 F.2d 700, 706 (9th Cir. 1985) ("[A] court which issues an injunction retains jurisdiction to modify the terms of the injunction if a change in circumstances so requires."). In *Sweeton v. Brown*, 27 F.3d 1162 (6th Cir. 1994) (en banc), this Court described a "flexible standard" having "ancient lineage in our common law," and stated that Sir Francis Bacon's "principles generally provide that a court has continuing jurisdiction to terminate or modify an injunction and that an equitable remedy should be enforced only as long as the equities of the case require." *Id.* at 1164. In ordering the injunctions dissolved, we focused on the fact that "[t]he foundation upon which the claim for injunctive relief was built has crumbled," and concluded that "[n]o basis in federal law exists for the injunctive relief imposed in this case." *Id.* We then stated:

> Injunctions are one of the law's most powerful weapons. Ongoing injunctions should be dissolved when they no longer meet the requirements of equity. The law changes and clarifies

> itself over time. Neither the doctrines of *res judicata* or waiver nor a proper respect for previously entered judgments requires that old injunctions remain in effect when the old law on which they were based has changed.

Id. at 1166-67.

Consistent with these standards, in *Deja Vu I*, this Court stated that "[u]pon remand, the district court should maintain the injunction until Metropolitan Nashville satisfies it that the constitutional problems with the Ordinance's definition of 'sexually oriented' and its judicial review procedures have been corrected." 274 F.3d at 403. Following the government's motion to dissolve the injunction, the district court held that the constitutional problems with the Ordinance had been rectified.[3] We agree.

1. Prompt Judicial Review

The Tennessee statute that modified the discretionary common law writ of certiorari now states:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the

[3] It is unclear to us why the district court stated that this Court's dictate to maintain the injunction until the constitutional problems were resolved, "makes Plaintiffs' Rule 60 argument meritless." It appears that the district court then essentially applied the standards from Rule 60(b)(5) – which is what this court's "dictate" instructed the district court to do. The district court's statement notwithstanding, it properly went on to conclude that maintenance of the injunction should no longer have prospective application, which is consistent with Rule 60(b)(5).

> United States, and either the petitioner or the respondent requests an expedited hearing, the court shall immediately grant the writ of certiorari, and shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari.

Tenn. Code Ann. § 27-9-111(e). Following the Supreme Court's decision in *Z.J. Gifts*, the judicial review statute clearly complies with the First Amendment's requirement of a prompt judicial decision. In *Z.J. Gifts*, the Supreme Court found that "Colorado's ordinary 'judicial review' rules offer adequate assurance, not only that *access* to the courts can be promptly obtained, but also that a judicial *decision* will be promptly forthcoming." 541 U.S. at 781 (emphases in original); *see also id.* at 782 ("[O]rdinary court procedural rules and practices, in Colorado as elsewhere, provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm."). Thus, "the First Amendment does not require special 'adult business' judicial review rules." *Id.* This holding, of course, applies where an ordinance "does not seek to *censor* material," but rather is a licensing scheme that "applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display." *Id.* at 783; *see also Deja Vu of Cincinnati, L.L.C. v. Union Township Bd. of Trustees*, 411 F.3d 777, 787-88 (6th Cir. 2005) (en banc). The licensing and permit criteria, M.C.L. § 6.54.050, 6.54.080, are reasonably objective, nondiscretionary criteria, such that the more relaxed standard of *Z.J. Gifts* would apply as opposed to the more stringent standard from *Freedman v. Maryland*, 380 U.S. 51 (1965). *See Deja Vu of Cincinnati*, 411 F.3d at 787 (noting that the Court in *Freedman* was confronted with a statute employing

subjective standards where a denial of a license would likely result in complete censorship and concluding that *Freedman*'s "special judicial review rules" do not apply to adult business licensing schemes).[4] Thus, pursuant to this standard, the government's expedited review provision complies with the First Amendment.

2. Definition of "Sexually Oriented"

In *Deja Vu I*, we held that the Ordinance's definition of "sexually oriented" was unconstitutionally overbroad. 274 F.3d at 387. "A law is overbroad under the First Amendment if it 'reaches a substantial number of impermissible applications' relative to the law's legitimate sweep." *Id.* (quoting *New York v. Ferber*, 458 U.S. 747, 771 (1982)). As this Court has noted, the doctrine is designed "to prevent the chilling of future protected expression." *Id.* (citation omitted).

The definition reviewed in *Deja Vu I* defined "sexually oriented" as "any exhibition of any motion pictures, films, or videos depicting 'specified sexual activities' or 'specified anatomical areas.'" M.C.L. § 6.54.070(Y) (1999) (amended). "'Specified anatomical areas'" included '[l]ess than completely and opaquely covered' buttocks and female breasts." *Deja Vu I*, 274 F.3d at 377 (quoting M.C.L. § 6.54.010(BB)). Based on these definitions, this Court concluded that "any movie or video featuring a single shot of a person's nude or partially-covered buttocks or a

[4] Even if we were to conclude that *Freedman* still applied to Metro Nashville's Ordinance, the Ordinance is still constitutional. Here, there are "special judicial review" rules with respect to First Amendment cases that will guarantee a prompt judicial decision. Thus, the Ordinance passes constitutional muster under both *Z.J Gifts* and *Freedman*.

woman's partially covered breast is a 'sexually oriented' film under the Ordinance, irrespective of whether the film's content constitutes 'adult entertainment' or causes the type of secondary effects . . . that Metropolitan Nashville seeks to regulate." *Id.* at 377-78. Thus, "[b]ecause this definition could apply to a range of expression that does not cause the secondary effects that the Ordinance was aimed to prevent, it is overbroad." *Id.* at 388.

Since this Court's ruling in *Deja Vu I*, the definition of "sexually oriented" has been amended and is now considerably narrower. It now reads:

> "Sexually oriented" when used to modify film, movie, motion picture, videocassette, slides, or other photographic reproductions shall mean a film, movie, motion picture, videocassette, slides, or other photographic reproductions that regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing "specified sexual activities or specified anatomical areas"[5] offered for observation by the patron(s) on the premises of a sexually oriented business.

Metro Code of Laws § 6.54.010(Y).

The definition of "sexually oriented business," which was not found to be constitutionally infirm in *Deja Vu I*, states: "Any commercial establishment which for a fee or incidentally to another service, regularly presents material or exhibitions distinguished or characterized by an

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[5] The definition of "specified sexual activities" includes sexual intercourse and fondling of buttocks or breast. *See* M.C.L. § 5.43.010(CC).

emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' as defined in this section for observations by patrons therein." M.C.L. § 6.54.010(Z). In *Deja Vu I*, we noted that if this definition stood alone, it would be overbroad, as it would include a hotel that offers its guests access to an adult cable channel, but found that the Ordinance avoided this problem by having four additional subsections, one of which must be satisfied, in order to fall within the Ordinance. These four subsections define "sexually oriented bookstore," "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented video store." M.C.L. § 6.54.010(Z)(1)-(4). Thus, we held that the requirement of being a "sexually oriented business" "narrows the Ordinance's application to those theaters that regularly present material distinguished or characterized by an emphasis on sex acts or particular body parts. Again, reading the definitions together saves the parts from overbreadth." *Deja Vu I*, 274 F.3d at 388.

The government took its cue from this decision by narrowing its definition of "sexually oriented" to require that the activities be "offered for observation by the patron(s) on the premises of a sexually oriented business." M.C.L. § 6.54.010(Y). The definition was also narrowed such that it no longer applies to "*any* exhibition of *any* motion pictures, films, or videos depicting 'specified sexual activities' or 'specified anatomical areas'" M.C.L. § 6.54.010(Y) (1999) (amended) (emphases added), but rather, now applies only to those that "regularly depict material which is distinguished or characterized by an emphasis on matter depicting or describing 'specified sexual activities or specified anatomical areas.'" M.C.L. § 6.54.010(Y). The district court found that these two

amendments cured the constitutional infirmities. We agree. None of this Court's concerns from *Deja Vu I* remain under the current definition. The definition means that only those activities that regularly depict specified sexual activities or anatomical areas and that occur on the premises of a sexually oriented business will be regulated. Our previous concerns involving, as an example, a hotel that offers its guests an adult cable channel, no longer remain under this narrowed language. Moreover, Deja Vu did not discuss overbreadth in its final brief or reply brief or allege that the definition was still unconstitutional.

B. Dismissal of the Case

Deja Vu also argues that it was improper for the district court to dismiss the case because Deja Vu never received a trial on the merits of its constitutional challenges. In 1999, however, the district court entered a permanent injunction following a hearing on December 21. A permanent injunction is granted only after a trial on the merits. MOORE'S FED. PRACTICE § 65.05 (3d ed. 2005); *see also Kallstrom*, 136 F.3d at 1067 ("Where the plaintiff establishes a constitutional violation after a trial on the merits, the plaintiff will be entitled to permanent injunctive relief upon showing 1) a continuing irreparable injury if the court fails to issue the injunction, and 2) the lack of an adequate remedy at law."); *see also Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12 (1987) (to justify permanent injunctive relief, plaintiff must show actual success on the merits); *Peabody Holding Co. v. Costain Group, PLC*, 813 F.Supp. 1402, 1414 (E.D. Mo. 1993) ("The standard for determining whether a permanent injunction should issue is essentially the same as the standard for a preliminary injunction, except that the

court determines the plaintiff's success on the merits rather than the plaintiff's likelihood of success on the merits.").

The district court's memorandum and analysis with regard to Deja Vu's motion for a preliminary injunction was incorporated into the district court's order making the preliminary injunction permanent. In that memorandum, the district court addressed what appears to be all of Deja Vu's challenges to the Ordinance, including the secondary effects argument that Deja Vu now claims it was never able to litigate. It was able to argue this point at the preliminary injunction stage; the district court just rejected its argument and then entered a final judgment. Whether the district court correctly rejected Deja Vu's claims appears not to be challenged at this stage; rather, Deja Vu argues that it never had the opportunity to raise its secondary effects argument. This claim is refuted by the district court's treatment of the issue in its Memorandum.

Finally, all courts have been proceeding as if Deja Vu had raised all of its claims. The district court specifically stated as much, as did this Court in *Deja Vu I*. 274 F.3d at 386 (noting that following the dissolution of the first preliminary injunction, "[t]he plaintiffs also moved for another preliminary injunction, raising all of their constitutional challenges to the Ordinance"). The district court also specifically ruled that the record was closed in 1999 when it granted the permanent injunction and made a final ruling on the merits.[6] Finally, in *Deja Vu I*, we noted

[6] The Order, in relevant part, states: "In this action, as stated on the record at the hearing on December 21, 1999, it appears that no further or additional relief is sought beyond that which has been

(Continued on following page)

that "[t]he parties agree that Metropolitan Nashville validly enacted the Ordinance. Additionally, Metropolitan Nashville's stated interests in reducing crime, open sex, and the solicitation of sex are substantial." *Deja Vu I*, 274 F.3d at 392.[7] Deja Vu's only recourse, if it wishes to challenge any unsettled aspects of the current statute, is to file a new case in district court.

III.

For the foregoing reasons, we AFFIRM the district court's order dissolving the permanent injunction and dismissing the case.

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granted by the preliminary injunction. The preliminary injunction heretofore issued is herewith made a permanent injunction. Accordingly, the defendants are permanently enjoined from enforcing Chapter 6.54 of the Metropolitan Code. The applications for interim attorneys' fees shall be deemed final applications for fees in favor of the prevailing parties as of the conclusion of this litigation by the entry of this order. The entry of this order shall constitute the final judgment in this action." JA 557-58 (footnotes omitted).

[7] We also "we decline[d] to tie the hands of local governments by extending *City of Paducah* [*v. Investment Entm't. Inc.*, 791 F.2d 463 (6th Cir. 1986)]'s reasoning to those regulations [such as the one before us] aimed only at redressing the secondary effects of the sex entertainment industry." *Deja Vu I.* 274 F.3d at 393.

274 F.3d 377

United States Court of Appeals,
Sixth Circuit.

DEJA VU OF NASHVILLE, INC., a Tennessee corporation; Michael Rucker, individually; Michael Butler, individually; Meroney Entertainment, Inc., d/b/a Ken's Gold Club, a Tennessee corporation; The Pleasure Palace, Inc., a Tennessee corporation; Dawn Pierce, individually; Elizabeth Martz, individually; Jerry C. Pendergrass, individually; The 822 Corporation; The 421 Corporation, Plaintiffs-Appellants (99-5071), Plaintiffs-Appellees (00-5881), Plaintiffs-Appellees/Cross-Appellants (00-5284/5288),

v.

The METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; Emmett Turner, Chief of Police of the Metropolitan Police Department, Defendants-Appellees (99-5071), Defendants-Appellants (00-5881), Defendants-Appellants/Cross-Appellees (00-5284/5288).

Nos. 99-5071, 00-5284, 00-5288 and 00-5881.

Argued Jan. 24, 2001.
Decided and Filed Dec. 6, 2001.
Rehearing and Suggestion for Rehearing En Banc Denied Feb. 5, 2002.

Bradley J. Shafer (argued and briefed), Shafer & Associates, P.C., Lansing, MI, Michael F. Pleasants (briefed), Memphis, TN, H. Louis Sirkin (briefed), Laura A.

Abrams, Sirkin, Pinales, Mezibov & Schwartz, Cincinnati, OH, John E. Herbison (briefed), Nashville, TN, for Plaintiffs-Appellants for No. 99-5071.

Francis H. Young (briefed), Shayna R. Abrams (briefed), Metropolitan Department of Law, Nashville, TN, Karl F. Dean (argued), Metropolitan Government of Nashville & Davidson County, Nashville, TN, for Defendants-Appellees for No. 99-5071.

Bradley J. Shafer (argued and briefed), Andrew K. Wilkins (briefed), Shafer & Associates, P.C., Lansing, MI, Michael F. Pleasants (briefed), Memphis, TN, H. Louis Sirkin (briefed), Laura A. Abrams (briefed), Jennifer M. Kinsley (briefed), Sirkin, Pinales, Mezibov & Schwartz, Cincinnati, OH, John E. Herbison (briefed), Nashville, TN, for Plaintiffs-Appellees/Cross-Appellants for Nos. 00-5284, 00-5288.

Francis H. Young (briefed), Shayna R. Abrams (briefed), Metropolitan Department of Law, Nashville, TN, Karl F. Dean (argued), Metropolitan Government of Nashville & Davidson County, Nashville, TN, for Defendants-Appellants/Cross-Appellees for Nos. 00-5284, 00-5288.

Bradley J. Shafer (argued and briefed), Andrew K. Wilkins (briefed), Shafer & Associates, P.C., Lansing, MI, Michael F. Pleasants, Memphis, TN, H. Louis Sirkin (briefed), Laura A. Abrams, Sirkin, Pinales, Mezibov & Schwartz, Cincinnati, OH, John E. Herbison (briefed), Nashville, TN, for Plaintiffs-Appellees for No. 00-5881.

James L. Charles, Francis H. Young (briefed), Shayna R. Abrams (briefed), Metropolitan Department of Law, Nashville, TN, Karl F. Dean (argued), Metropolitan

Government of Nashville & Davidson County, Nashville, TN, for Defendants-Appellants for No. 00-5881.

Before: MARTIN, Chief Judge; WELLFORD and SUHRHEINRICH, Circuit Judges.

BOYCE F. MARTIN, Jr., C.J., delivered the opinion of the court, in which SUHRHEINRICH, J., joined. WELLFORD, J. (pp. 403-07), delivered a separate opinion concurring in part and dissenting in part.

OPINION

BOYCE F. MARTIN, JR., Chief Judge.

On August 19, 1997, the Council for the Metropolitan Government of Nashville and Davidson County, Tennessee, passed an ordinance, now codified as Metropolitan Code of Laws Chapter 6.54, "Sexually Oriented Businesses," containing licensing requirements for adult entertainment businesses. Shortly thereafter, plaintiffs in this consolidated appeal filed suit in federal court to enjoin the Ordinance's enforcement on First and Fourteenth Amendment grounds. Since that time, injunctions have been issued, dissolved, and issued anew in response to the four amended versions of the Ordinance enacted by Metropolitan Nashville during the four-year pendency of this litigation.[1] The parties now appeal and cross-appeal

[1] Although Metropolitan Nashville has enacted four new versions of the Ordinance in response to various rulings by the district court, with the most recent version enacted in 2000, only the 1999 version is relevant to this appeal. Every citation thus will be to the 1999 version unless otherwise noted.

various aspects of the district court's injunctive and procedural rulings.

I.

The Ordinance requires all "sexually oriented businesses" to obtain a license issued by the Sexually Oriented Businesses Licensing Board before being permitted to operate. *See* Metropolitan Code of Laws § 6.54.030(A). Additionally, all entertainers working within a sexually oriented business must obtain a permit from the Board. *See* M.C.L. § 6.54.060(A). The permit requirements are essentially identical to the license requirements. *See* M.C.L. § 6.54.080(A). Licenses and permits must be renewed on a yearly basis, and can be suspended or revoked for, among other things, repeated failure to comply with any of the licensing or permitting requirements, failure to pay required fees, or knowingly denying access to law enforcement personnel during business hours. *See* M.C.L. §§ 6.54.110; 6.54.150(A)(2), (3), and (6). The Ordinance includes a civil disability provision (M.C.L. §§ 6.54.050(B)(2); 6.54.080(A)(2)), a disclosure provision (M.C.L. §§ 6.54.040(A)(5); 6.54.070(A)(4)), and a no-touch/buffer zone provision (M.C.L. § 6.54.140(C)), applicable to all license and permit-seekers. Metropolitan Nashville charges applicants five hundred dollars to apply for a license, and one hundred dollars to apply for a permit. *See* M.C.L. § 6.54.090.

The plaintiffs are a group of establishments and individuals providing adult entertainment in the form of live nude or semi-nude performance dance, as well as selling, renting or presenting sexually oriented books, magazines, and videos. The "Deja Vu plaintiffs" include

four corporations, two owner/operators, and two dancers. The "Pendergrass plaintiffs" include two corporations and one owner/operator. All the plaintiffs fall within the Ordinance's definitions of either "sexually oriented business," "operator," or "entertainer," and thus each is subject to the Ordinance's requirements. *See* M.C.L. §§ 6.54.010(G), (P), and (Y), respectively.

In October 1997, the Deja Vu plaintiffs sought a preliminary injunction based solely on the ground that the Ordinance failed to provide prompt judicial review of licensing decisions by the Board. The Deja Vu plaintiffs reserved their right to request a future preliminary injunction on other grounds. Shortly thereafter, the Pendergrass plaintiffs filed a similar complaint, requesting a preliminary injunction on the grounds that the Ordinance failed to provide prompt judicial review of licensing decisions and that its civil disability provisions violated the First Amendment. On December 11, the district court consolidated the two cases and granted a preliminary injunction because the Ordinance failed to provide for prompt judicial review; the district court did not address the constitutionality of the disability provisions. Metropolitan Nashville subsequently amended the Ordinance, and, on December 7, 1998, the district court dissolved the preliminary injunction. The plaintiffs timely appealed the dissolution.

The plaintiffs also moved for another preliminary injunction, raising all of their constitutional challenges to the Ordinance. On October 1, 1999, the district court granted the motion, finding the definitions of "sexually oriented" and "sexually oriented theater," the civil disabilities provision, the disclosure provision, and the fee amounts unconstitutional. The court further found that

the tainted provisions could not be severed, and therefore enjoined the entire Ordinance. In December, the district court made the preliminary injunction permanent. Metropolitan Nashville timely appealed the district court's decision striking down the definitions and the civil disability, disclosure, and fee provisions; the refusal to sever the tainted provisions; and the imposition of the permanent injunction. The plaintiffs timely cross-appealed the district court's decision upholding the Ordinance's definition of "sexually oriented business/establishment" and the buffer zone/no-touch provision. The plaintiffs also appealed the district court's grant of a protective order to Metropolitan Nashville.

In early 2000, Metropolitan Nashville again amended the Ordinance to remove the portions that the district court found unconstitutional, and then filed a Rule 60(b) motion to dissolve the injunction with the district court. The district court denied the motion on the grounds that it no longer had jurisdiction over the case because Metropolitan Nashville had already appealed its judgment to this Court. Metropolitan Nashville timely appealed that decision as well.

II.

As an initial matter, we note that none of Metropolitan Nashville's issues on appeal have been rendered moot by the current version of the Ordinance, which was enacted in early 2000. "[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982). Here, Metropolitan

Nashville explicitly enacted the 2000 version in order to enforce the Ordinance pending this appeal. It has repeatedly expressed its intention to reenact those portions of the Ordinance judged unconstitutional by the district court at the earliest opportunity. Accordingly, we must now address the constitutionality of the following portions of the Ordinance: the definitions of "sexually oriented," "sexually oriented business/establishment," and "sexually oriented theater;" the civil disability provision; the disclosure provision; the fees provision; the buffer zone/no touch provision; and the mechanisms provided for judicial review. We review a district court's decision to grant or deny a permanent injunction, including both its factual and legal conclusions, *de novo* when constitutional facts are at issue. *See Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 192 (6th Cir.1997). All other factual findings are reviewed for clear error. *See id.*

A.

First, we must examine the Ordinance's definitions of "sexually oriented," "sexually oriented business/establishment," and "sexually oriented theater" to determine whether they are unconstitutionally overbroad. A law is overbroad under the First Amendment if it "reaches a substantial number of impermissible applications" relative to the law's legitimate sweep. *New York v. Ferber*, 458 U.S. 747, 771, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). The overbreadth doctrine exists "to prevent the chilling of future protected expression." *Staley v. Jones*, 239 F.3d 769, 779 (6th Cir.2001). Therefore, any law imposing restrictions so broad that it chills speech outside the purview of its legitimate regulatory purpose will be struck down. For the same reason, the plaintiffs have standing to challenge the

Ordinance's overbreadth even though they do not dispute that the Ordinance applies to each of them. "The overbreadth doctrine constitutes an exception to traditional rules of standing" and allows claimants to assert the rights of parties not before the court. *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 135 (6th Cir.1994).

We agree with the district court that the definition of "sexually oriented" is unconstitutionally overbroad. In relevant part, the Ordinance defines "sexually oriented" as "any exhibition of any motion pictures, films or videos depicting 'specified sexual activities' or 'specified anatomical areas.'" M.C.L. § 6.54.070(Y). "Specified anatomical areas" include "[l]ess than completely and opaquely covered" buttocks and female breasts. M.C.L. § 6.54.010(BB). Thus, any movie or video featuring a single shot of a person's nude or partially-covered buttocks or a woman's partially covered breast is a "sexually oriented" film under the Ordinance, irrespective of whether the film's content constitutes "adult entertainment" or causes the type of secondary effects, such as crime (sexual and nonsexual) and public health risks, that Metropolitan Nashville seeks to regulate. Because this definition could apply to a range of expression that does not cause the secondary effects that the Ordinance was aimed to prevent, it is overbroad.

We do not, however, find the definition of "sexually oriented business/establishment" overbroad. The Ordinance defines a "sexually oriented business/establishment" at Section 6.54.010(Z) as:

> Any commercial establishment which for a fee or incidentally to another service, regularly presents material or exhibitions distinguished or

> characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observations by patrons therein.

Four subsections then follow this definition, defining the terms "sexually oriented bookstore," "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented video store." M.C.L. §§ 6.54.010(Z)(1)-(4). If the "sexually oriented business/establishment" definition stood alone, we would find it unconstitutionally overbroad, as it could encompass such businesses as a hotel that offers its guests access to an adult cable channel. The record reflects, however, that a business will be subject to the Ordinance's licensing requirements only if the business satisfies both the "sexually oriented business/establishment" definition *and* one of the four subsections' definitions. When read in conjunction with the four subsections, the definition no longer sweeps too broadly.

For the same reason, we find no constitutional problem with the Ordinance's definition of "sexually oriented theater," the only subsection definition challenged by the plaintiffs on appeal. "Sexually oriented theater," defined in Section 6.54.010(Z)(3), means:

> [A]n enclosed area, not including a booth, regularly used for presenting films, motion pictures, videocassettes, slides, or other photographic reproductions or other material depicting, describing, or relating to "specified sexual activities" or "specified anatomical areas," as defined in this section, for observation by patrons therein.

"Specified sexual activities" include sexual intercourse and fondling of buttocks or breasts. *See* M.C.L. § 5.43.010(CC).

A significant number of mainstream movies depict people fondling breasts or buttocks, and an even larger number "relate to" sex. Again, the risk that this definition might chill a range of protected speech would require us to find it unconstitutionally overbroad if it stood alone. The additional requirement of being a "sexually oriented business/establishment," however, narrows the Ordinance's application to those theaters that regularly present material distinguished or characterized by an emphasis on sex acts or particular body parts. Again, reading the definitions together saves the parts from overbreadth.[2]

Finally, even though we find the Ordinance's definition of "sexually oriented" overbroad, we must, if possible, give effect to the Ordinance's severability clause so as not to invalidate the entire act. *See Moore v. Fowinkle*, 512 F.2d 629, 637 (6th Cir.1975). By including a severability clause, found at Section 6.54.170, Metropolitan Nashville created a presumption that it did not intend the statute's validity to hinge on any constitutionally infirm provision. *See Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 932, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). We find that the definition of "sexually oriented" can easily be severed from the Ordinance without having any impact on

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[2] We note that these constitutional issues would never have arisen had the Ordinance been written more clearly. Section 6.54.010(Z) could have simply stated that its definition must be read in conjunction with its subsections. Alternatively, the Ordinance could have defined "sexually oriented business/establishment" at Section 6.54.010(Z) as "any one of the following businesses," and then listed the four businesses currently defined in the subsections (with the necessary limiting language incorporated into each business's definition). Whatever the difficulties inherent in writing laws, it is not too much to ask that municipalities carefully draft legislation intended to regulate protected activities.

the licensing scheme. In fact, we are a bit confused as to why this definition had to be litigated at all, as Metropolitan Nashville argues strenuously in its brief that it is superfluous. Our independent review of the Ordinance reveals that, indeed, the phrase "sexually oriented" is never used but in conjunction with some other word that has its own definition. *See generally* § 6.54.010 (containing definitions of "sexually oriented films," "sexually oriented theaters," and "sexually oriented nightclubs," to name a few). For whatever reason, Metropolitan Nashville saw fit to have us decide whether this apparently meaningless term must be removed from its Ordinance. We have and it must.

B.

Metropolitan Nashville next appeals the district court's decision that the Ordinance's "civil disabilities provisions" violate the First Amendment. Under those provisions, no individual license or permit applicant who has had a misdemeanor conviction for a crime of a sexual nature may receive a license or permit for two years following the date of the conviction.[3] *See* M.C.L. §§ 6.54.050(B)(2)(a); 6.54.080(A)(2)(a). No applicant who

[3] The following constitute "crimes of a sexual nature" under the Ordinance: "the crimes of rape, aggravated rape, aggravated sexual assault, public indecency, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or crimes committed in a jurisdiction other than Tennessee which, if committed in this state, would have constituted the crimes listed above. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used to determine what classification the offense is given." M.C.L. § 6.54.010(D).

has had a felony conviction for a crime of a sexual nature may receive a license or permit for five years following the date of the conviction. *See* §§ 6.54.050(B)(2)(b); 6.54.080(A)(2)(b).

To satisfy Article III's standing requirement, (1) a plaintiff must have suffered some actual or threatened injury due to the alleged illegal conduct of the defendant; (2) the injury must be "fairly traceable" to the challenged action; and (3) there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury. *See Coyne v. American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir.1999). The Supreme Court has further defined the injury-in-fact requirement by stating that a plaintiff must show "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Plaintiffs Deja Vu and Michael Butler, Deja Vu's former Vice-President, are the only Deja Vu plaintiffs who allege they have standing to challenge the civil disabilities provisions because Butler was convicted of statutory rape in 1995. Although they acknowledge Butler no longer works for Deja Vu, they claim that he quit his job only because Deja Vu was forced to seek a license in 1999, after the district court dissolved the first preliminary injunction and denied plaintiffs a stay pending its decision on their motion for a second preliminary injunction. Therefore, Deja Vu and Butler contend they were forced to choose between the "Scylla of intentionally flouting state law and the Charybdis of forgoing what [they believed] to be constitutionally protected activity." *Steffel v. Thompson*, 415 U.S. 452, 462, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). They argue that they should not be denied standing to

challenge the civil disabilities provisions merely because Butler no longer works for Deja Vu, when it was the enforcement of that very provision that forced Butler to resign.

Although attractive, this argument has no merit under standing jurisprudence. Because Deja Vu does not currently employ anyone who could arguably be subjected to the disabilities provisions, any threat it alleges with regard to those provisions is, by definition, hypothetical. Hypothetical injury does not equal injury-in-fact. *See Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. Moreover, Deja Vu did not rehire Butler as Vice President when the district court enjoined enforcement of the civil disabilities provisions, nor does it allege any plans to do so should we uphold that injunction. Similarly, Butler does not allege he would seek such a job were it not for the disabilities provisions. Therefore, neither plaintiff has suffered a harm likely to be redressed by a favorable decision. *See Coyne*, 183 F.3d at 494 (citing *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982)). Because none of the other individual plaintiffs alleged that the civil disability provisions rendered them ineligible to receive a permit, we agree with Metropolitan Nashville that none of the Deja Vu plaintiffs have standing to challenge the civil disabilities provisions.

We find, however, that the Pendergrass plaintiffs do have standing to challenge the provisions. At the time the district court ruled on this issue, Jerry Pendergrass was an officer, a director, and the sole shareholder of the 822 Corporation. Pendergrass was convicted of a misdemeanor obscenity offense on May 22, 1997, and he was required to apply for a license by March 15, 1999, within two years of

the date of his conviction. Because of the civil disabilities provisions, Pendergrass, and consequently the 822 Corporation, was ineligible to receive an operating license. Accordingly, both parties have standing to challenge those provisions.

The Pendergrass plaintiffs' challenge has not been mooted merely because over two years have passed and his business now possesses an operating license, as this case falls squarely within the "capable of repetition, yet evading review" exception to mootness. *See Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975). Under this exception, the Pendergrass plaintiffs must show that 1) the challenged action will be of a duration too short to be fully litigated prior to its cessation or expiration, and 2) there is a "reasonable expectation that the same complaining party will be subjected to the same action again." *Id.* Even if an applicant seeks a license the day after his or her misdemeanor conviction, that still leaves only two years for the applicant to exhaust the Ordinance's application and appeal procedures and fully litigate the claim in the federal courts. As a practical matter, this cannot be done. Additionally, because the range of disabling sex crimes is relatively large, and because, as Metropolitan Nashville itself points out, it is reasonably foreseeable that someone with a sex crime history will choose to work for or be involved with a sexually oriented business, there is a reasonable probability that a future person connected with the 822 Corporation will have a criminal history that renders the Corporation ineligible for a license under the civil disabilities provisions. Therefore, we will proceed to the merits of the plaintiffs' claim.

"[N]ude dancing of the type at issue here is expressive conduct," which falls "within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion). Therefore, any ordinance regulating nude dancing must be analyzed to ensure it does not unduly impair the exercise of First Amendment rights. The level of scrutiny we apply depends on the type of regulation we address. For instance, if the challenged law is "content based," that is, intended to impact speech, the law must survive strict scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). "In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny," one which was first enunciated as a four-step test in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). *Turner Broad.*, 512 U.S. at 642, 114 S.Ct. 2445. Systems of prior restraint will be upheld only if they provide for prompt judicial review of all decisions denying the right to speak, while also passing the appropriate level of scrutiny. *See Freedman v. State of Maryland*, 380 U.S. 51, 58-59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

The plaintiffs argue that the Ordinance should be subjected to strict scrutiny because the civil disabilities provisions amount to an unlawful prior restraint in violation of the First Amendment. "A 'prior restraint' exists when speech is conditioned upon the prior approval of public officials," and any system of prior restraint carries a heavy presumption against its validity. *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 889 (6th Cir.2000). Although the plaintiffs are correct in asserting that the Ordinance constitutes a system of prior restraint, that

argument more properly applies to our examination of the Ordinance's mechanisms for providing prompt judicial review, *see* Part II. F, *infra*, rather than our decision of which level of constitutional scrutiny to apply. What the plaintiffs actually, though obliquely, argue here is that the Ordinance is content-based, and thus must withstand strict scrutiny. *See, e.g., Turner Broad.*, 512 U.S. at 642, 114 S.Ct. 2445. Metropolitan Nashville responds that the Ordinance is a content-neutral regulation aimed at redressing the secondary effects of sexually oriented businesses that must satisfy the less-demanding four-part test of *O'Brien*.

We have previously recognized that ordinances aimed at regulating adult entertainment businesses constitute content-based regulations, but that "a distinction may be drawn between adult [businesses] and other kinds of [businesses] without violating the government's paramount obligation of neutrality" when the government seeks to regulate only the secondary effects of erotic speech, and not the speech itself. *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir.1998). To withstand constitutional scrutiny, then, (1) the Ordinance must have been enacted within Metropolitan Nashville's constitutional power; (2) the Ordinance must further a substantial governmental interest; (3) the interest must be unrelated to the suppression of speech; and (4) the Ordinance may pose only an "incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 226 (6th Cir.1995) (citing *O'Brien*, 391 U.S. at 377, 88 S.Ct. 1673).

The parties agree that Metropolitan Nashville validly enacted the Ordinance. Additionally, Metropolitan Nashville's

stated interests in reducing crime, open sex, and the solicitation of sex are substantial. *See Richland Bookmart, Inc.*, 137 F.3d at 440. Moreover, regulations aimed at redressing the secondary effects of the sex industry are unrelated to the suppression of erotic speech. *See East Brooks Books, Inc.*, 48 F.3d at 226. Therefore, we need only determine whether the Ordinance's civil disabilities provisions constitute merely an incidental burden on the plaintiffs' First Amendment rights that is essential to furthering Metropolitan Nashville's stated interest in battling the secondary effects of the sex industry.

The Supreme Court has recently noted that "crime and other public health and safety problems are caused by the presence of nude dancing establishments. . . ." *Pap's A.M.*, 529 U.S. at 300, 120 S.Ct. 1382. The Ordinance's civil disabilities provisions serve to weed out those applicants most likely to engage in the type of criminal behavior that the Ordinance seeks to redress by temporarily disqualifying those who have recently committed such acts from working for sexually oriented establishments, or alternatively, from declaring any sexually oriented establishment closely associated with such an individual ineligible to operate. In light of the temporary nature of the ban and the narrow reach of the provisions (applying only to those who have committed a felony sex crime within the last five years or a misdemeanor sex crime within the last two years), we do not find that these provisions violate the Constitution.

Contrary to the plaintiffs' arguments, our holding in *City of Paducah v. Investment Entm't, Inc.*, 791 F.2d 463 (6th Cir.1986), does not control this case. In *City of Paducah*, we invalidated a municipal regulation that revoked all business licenses and permits from those businesses

whose employees had distributed or exhibited obscene material. *See City of Paducah*, 791 F.2d at 464. In that case, however, we explicitly found that the purpose of the challenged portion of the regulation was "to control future expression by businesses that have been subjected to the nuisance abatement procedure." *Id.* at 470. In contrast, we find here that the Ordinance's civil disabilities provisions exist to combat the sex crimes connected with sexually oriented establishments by temporarily prohibiting those recently convicted of such crimes from employment with those establishments. Because both the Ordinance and the civil disabilities provisions are unrelated to speech, we are faced with a different issue than that decided in *City of Paducah*. Furthermore, because *City of Paducah* was a "prior restraint" case, it was concerned with whether the regulation at issue provided sufficient mechanisms for prompt judicial review. *See id.* We agree that the instant Ordinance must provide for prompt judicial review, and that such review must encompass any findings of ineligibility pursuant to the civil disabilities provisions. *See* Part II. F, *infra*. Nothing in the civil disabilities provisions themselves, however, renders them facially unconstitutional, and we decline to tie the hands of local governments by extending *City of Paducah's* reasoning to those regulations aimed only at redressing the secondary effects of the sex entertainment industry.

C.

Because the district court found the Ordinance's civil disabilities provisions unconstitutional, it also invalidated its "disclosure provisions" which require that applicants provide certain information in order to conduct a background check into each applicant's criminal history. The

disclosure provisions require that license and permit applicants divulge such personal information as full name, height, weight, hair color, eye color, date of birth, current residential address, and all residential addresses for the prior three years. *See* §§ 6.54.040(A)(5)(a), (b), and (c); 6.54.070(A)(4)(a), (b), (c), and (d). Additionally, applicants must provide their fingerprints and two portrait photographs to facilitate the background check, which the Metropolitan Police Department conducts. *See* §§ 6.54.040(A)(5)(g); 6.54.070(A)(4)(g). Because each plaintiff either has or will have to apply for either a permit or a license, all are required to provide this information to the Board. Accordingly, all the plaintiffs have standing to challenge this provision.

The Ordinance states that the required disclosures are "for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature." *See* M.C.L. § 6.54.040(A)(5)(c); M.C.L. § 6.54.070(A)(4)(c); M.C.L. § 6.54.070(A)(4)(d). Because this purpose is "unrelated to the suppression of expression," we again apply the four-part *O'Brien* test to determine whether the disclosure provisions are unconstitutional. *Pap's A.M.*, 529 U.S. at 289, 120 S.Ct. 1382.

As stated above, *O'Brien* requires us to determine whether Metropolitan Nashville enacted the disclosure provisions (1) within its constitutional power, (2) to further a substantial governmental interest that is (3) unrelated to the suppression of speech, and whether (4) the provisions pose only an "incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *East Brooks Books, Inc.*, 48 F.3d at 226. Here, Metropolitan Nashville legitimately enacted the disclosure provisions in order to facilitate the background

check. In addition, the required disclosures ensure continuing compliance with the Ordinance's licensing and permitting requirements. Although the plaintiffs point to testimony by Metropolitan Police Department Vice Squad Captain Bawcum that only a person's name and date of birth are used to run a background check, they do not argue that the required disclosures do not further Metropolitan Nashville's substantial governmental interest in eradicating the secondary effects of sexually oriented businesses.[4] "States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.'" *Borman's, Inc. v. Mich. Prop. & Cas. Guar. Assoc.*, 925 F.2d 160, 162 (6th Cir.1991) (quoting *Vance v. Bradley*, 440 U.S. 93, 111, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979)). The plaintiffs have failed to convince us that requiring identifying information as part of the application process does not facilitate enforcement of the Ordinance's provisions (for instance, by assuring that the entertainer displaying the permit matches the physical description contained in the

[4] Simply because Metropolitan Nashville codified only its interest in facilitating the background checks as the justification for the required disclosures, we are not prohibited from taking into account other interests the disclosures may serve. "Our appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter, J., concurring in the judgment).

applicant's file). The provisions thus satisfy the first, second, and third parts of the *O'Brien* test.

The plaintiffs argue that the disclosure provisions fail the fourth prong, however, because under the Tennessee Open Records Act, members of the public with illicit motives can easily obtain the personal information contained in the plaintiffs' application files, which includes their names and residential addresses. Therefore, the provisions will pose more than an incidental burden on First Amendment activities because those wishing to engage in such activities will be chilled by the threat of public exposure and possible violence. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (stating purpose of First Amendment is "to protect unpopular individuals from retaliation – and their ideas from suppression"). Metropolitan Nashville responds that the required information is protected from public release (1) by the district court's order; (2) by Metropolitan Nashville's own opinion; (3) by the Tennessee Attorney General's opinion; and (4) by our decision in *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064-65 (6th Cir.1998) (finding release of certain personnel information constitutionally prohibited).

Metropolitan Nashville's first three arguments cannot stand. First, the district court sealed the application files only "during the pendency of this litigation," and therefore its order is insufficient to protect any applicant's information indefinitely. Second, neither Metropolitan Nashville nor the Tennessee Attorney General have the power to create exceptions to Tennessee's Open Records Act. The Tennessee Supreme Court has interpreted the Tennessee Open Records Act, T.C.A. § 10-7-503(a), to mean that "the legislature reserved to itself alone the power to make

public policy exceptions." *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 685 (Tenn.1994) (quoting *Memphis Publ'g Co. v. Holt*, 710 S.W.2d 513, 517 (Tenn.1986)). Nonetheless, we agree with Metropolitan Nashville that our decision in *Kallstrom* saves this provision from being unconstitutional by prohibiting public release of all applicants' names and current and past residential addresses.

Kallstrom held that police officers have a constitutionally protected privacy interest in their otherwise-public personnel file information, which includes addresses, phone numbers, and family member information, when the release of that information creates "a very real threat to the officers' and their family members' personal security and bodily integrity, and possibly their lives." *Kallstrom*, 136 F.3d at 1063. Here, the plaintiffs presented significant evidence that the requirement that applicants submit their names and past and current addresses to a public forum poses serious risks to their personal security. For instance, plaintiff Dawn Pierce, an entertainer at Deja Vu, testified that entertainers in the past have been stalked, harassed, and injured by customers, and that she is afraid to make public her name and residential address, as required by the Ordinance, because of serious potential risks to her physical safety and well-being. Dancers use stage names and have unpublished addresses and telephone numbers in order to minimize the risks of such harassment. Additionally, Pierce testified that there are a number of local organizations that have taken a strong stance against her profession. She is therefore also concerned that requiring her to release her name and residential address to a public forum will result in such groups harassing her at her home as a result of her choice to

engage in erotic speech. Such risks also apply to individual business associates, such as registered agents, officers, directors, certain shareholders, club managers, and assistant managers, all of whom are likely to have to provide their names and addresses to the Board. *See* M.C.L. § 6.54.040(A)(5)(i), (j).

Applying *Kallstrom*'s reasoning to this context, we find that all sexually oriented business license and permit applicants' names and current and past residential addresses constitute protected private information and are therefore exempted from Tennessee's Open Records Act. Metropolitan Nashville cannot publicly release such private information; it can, however, require applicants to provide the identifying information to the licensing board for the limited purpose of ensuring compliance with the Ordinance's regulations, provided Metropolitan Nashville keeps that information under seal. "Anonymity is a shield from the tyranny of the majority," *McIntyre*, 514 U.S. at 357, 115 S.Ct. 1511, but it is not a shield from all legitimate regulation. Therefore, as a result of our decision in *Kallstrom*, prohibiting public dissemination of the required private information, Metropolitan Nashville's disclosure requirements satisfy the fourth part of *O'Brien* because they are essential to ensuring continuing compliance with the Ordinance's licensing and permitting requirements, and because the reporting requirements pose only an incidental burden on applicants.

D.

The plaintiffs next challenge the constitutionality of the fees charged pursuant to the Ordinance. The government may not tax the exercise of a constitutionally protected right.

See Northeast Ohio Coalition for the Homeless v. City of Cleveland, 105 F.3d 1107, 1109 (6th Cir.1997). Nonetheless, "an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state activity." *Id.* at 1109-10. Such a fee is not excessive, even if it is more than nominal, so long as it is "reasonably related to the expenses incident to the administration of the ordinance." *Id.* at 1110.

The Ordinance charges applicants five hundred dollars for a license, and one hundred dollars for a permit. Additionally, the Ordinance requires that "[i]f the [license or permit] application is denied, one-half of the fee shall be returned." *See* M.C.L. § 6.54.090(A), (B). Although the district court found the direct cost of processing license applications was thirty-three dollars, and the direct cost of processing permit applications was forty-three dollars, it failed to include in its calculations the $40,000 paid annually to an inspector "to enforce the civil disabilities provision," because it had already held that provision unconstitutional. The record reflects that comparing the yearly total of estimated fee revenue with the annual costs of enforcing the Ordinance results in a net loss to Metropolitan Nashville. Accordingly, we find that the fees charged are reasonably related to the expenses incident to the administration of the Ordinance.

E.

Next the plaintiffs raise challenges to the Ordinance's "no touch/buffer zone" provision. Section 6.54.140(C) states that

> No customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment. All performances of live sexually oriented entertainment shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer.

As with any other violation of Chapter 6.54, one violation of the buffer zone may result in a five hundred dollar fine, suspension of the operating license for between five and thirty days, or both. *See* M.C.L. § 6.54.150(B)(2). A second violation within a two-year period requires suspension for between thirty-one and ninety days. *See* M.C.L. § 6.54.150(B)(3). A third violation will result in a one-year revocation of the license. *See* M.C.L. § 6.54.150(C)(9).

As an initial matter, we note that the three-foot buffer zone surrounds the stage, not the dancer. Therefore, we reject the plaintiffs' argument that the provision creates a "floating buffer zone." *See* M.C.L. § 6.54.140(C); M.C.L. § 6.54.050(A)(3) (stating "[a] three-foot boundary from the outer edge of the stage shall be indicated on the floor . . . so that the customer will not invade the three-foot boundary").

We find that this provision also satisfies the *O'Brien* test: Metropolitan Nashville properly passed this portion of the Ordinance pursuant to its police power; it intended this provision to redress the high instances of sex crimes prevalent at sexually oriented businesses and to deter the spread of disease; and requiring dancers to perform on stages removed three feet from any customer poses only an incidental burden on their right to erotic speech that is no

greater than is essential to further Metropolitan Nashville's substantial interests. *See DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 412-13 (6th Cir.1997) (upholding six-foot buffer zone to more effectively enforce ban on contact between erotic dancers and audience members and to prevent occurrence of activities likely to result in criminal behavior or to prevent risk of disease).

We agree with the plaintiffs that the First Amendment protects the entertainers and audience members' right to free expressive association. They are certainly engaged in a "collective effort on behalf of shared goals." *See Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). The dancers and customers work together as speaker and audience to create an erotic, sexually-charged atmosphere, and although society may not find that a particularly worthy goal, it is a shared one nonetheless. The right to associate for expressive purposes, however, is not absolute. "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623, 104 S.Ct. 3244, 82 L.Ed.2d 462. In attempting to restrict opportunities to engage in prostitution and to guard against the spread of disease through the public release or exchange of bodily fluids, Metropolitan Nashville has gone no farther than necessary by requiring a three-foot distance between the erotic dancer and the audience. *See DLS*, 107 F.3d at 412-13.

The plaintiffs repeat the same arguments we rejected in *DLS*. First, they argue that the no touch/buffer zone provision goes too far because of its economic impact on the relevant market. Specifically, the plaintiffs point to

evidence showing that compliance with the no touch/buffer zone provision will require extensive renovations of their clubs. We rejected that argument, however, in *DLS*, noting that the relevant inquiry is not whether the Ordinance will cause any economic impact on the sexually oriented businesses. *Id.* at 413. "[T]he First Amendment requires only that [Metropolitan Nashville] refrain from effectively denying [sexually oriented business owners] a reasonable opportunity to open and operate an adult theater within the city. . . . " *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Although we do not doubt that compliance with the Ordinance will cut into the plaintiffs' profits, the plaintiffs have failed to introduce any evidence showing that they will not have a reasonable opportunity to operate their establishments.

Second, the plaintiffs argue that the provision denies to erotic dancers the ability to profit from their expression by foreclosing the possibility of receiving tips. The plaintiffs are correct that the government cannot prohibit compensation for the exercise of First Amendment rights. *See, e.g., Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105, 115-16, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991). Customers, however, remain free under the Ordinance to tip dancers before or after their performances. Alternatively, the clubs could decide to increase dancers' salaries, rather than requiring them to earn a living wage from their tips. In any event, the no touch/buffer zone provision merely requires that audience members not hand the dancers money during their dances, a sufficiently limited burden on the plaintiffs' First Amendment rights. For a similar reason, we also reject the plaintiffs' argument that the buffer zone violates the First Amendment by prohibiting all verbal communication between entertainers and customers. Again,

if customers and entertainers cannot converse while standing a mere three feet apart, it is because the plaintiffs have chosen to play their music at such a volume that conversation is impossible. Contrary to the plaintiffs' claims, the Ordinance does not force entertainers to choose between verbal communication and no music; as Metropolitan Nashville suggests, the plaintiffs can simply turn their music down a bit. The point is that any problems dancers may experience with receiving tips or speaking with customers will be caused not by the Ordinance, but by the clubs' refusal to alter their standard operating procedures in response to these constitutional regulations.

Finally, the plaintiffs challenge the no touch/buffer zone provision on the ground that it does not contain a mens rea requirement. As the Ordinance does not expressly limit the prohibited touching to intentional or knowing touches, the plaintiffs claim that even entertainers who merely seek to push a customer away will violate it. We disagree with the plaintiffs' reading of this provision. The provision states, in relevant part, that "[n]o customer shall be permitted to have any physical contact with any entertainer" during a live performance, and that all such performances must occur on a stage "removed at least three feet from the nearest customer." M.C.L. § 6.54.140(C). Rather than reading the provision as enacting two separate requirements, we read it as a single mandate, with the "no touch" portion setting forth a broad policy statement that no contact between dancers and customers shall occur during performances, and the "buffer zone" rule showing the specific way to implement that policy by prohibiting clubs from allowing customers within three feet of the stage during dances. Therefore, the provision places a duty not on the entertainer to avoid

touching customers, but on the owners and operators of clubs to protect entertainers from being touched by customers by requiring customers to stay three feet away from the stage. *See also* § 6.54.050(A)(3) (detailing the licensee club's responsibility for noticeably demarcating the three-foot buffer zone). Furthermore, logic compels this interpretation. It would simply be nonsensical for Metropolitan Nashville to put the onus of customer control on the entertainer who is already removed at least three feet from the customer, is engaged in live entertainment, and is, by definition, incapable of preventing an approaching customer from touching her without engaging in the prohibited touching herself. "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982). Accordingly, we reject the plaintiffs' claim that the no-touch/buffer zone provision imposes *any* duty on entertainers, much less one that requires them to be held strictly liable for any violations.

Moreover, the Ordinance does not allow for strict liability, even for licensees. Section 6.54.150(B)(1) states that a club will be fined or have its license suspended (or both) for violating any of the Ordinance's provisions. However, Subsection (B)(1) also affords licensees the affirmative defense that management was "powerless to prevent" the violation. Accordingly, liability for violating the no-touch/buffer zone provision is limited to those instances where a licensee could have, but failed to prevent the proscribed conduct. The provision, thus interpreted, is constitutional.

F.

Finally, we address the plaintiffs' argument that the Ordinance fails to provide the prompt judicial review required of prior restraint schemes by *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). Specifically, the plaintiffs argue that because the Ordinance requires them to proceed to court via a common law writ of certiorari, it fails to protect their right to expeditious judicial review on the merits. Before reaching that issue, however, we must address Metropolitan Nashville's argument that the plaintiffs have failed to present us with a justiciable controversy. We review issues of Article III justiciability *de novo*. *See NRA v. Magaw*, 132 F.3d 272, 278 (6th Cir.1997).

1.

Metropolitan Nashville argues that the plaintiff businesses and operators have no standing to challenge the licensing procedures because they have all been issued licenses. For support, Metropolitan Nashville cites *DLS*, which held that a business and its owner did not have standing to challenge a licensing procedure under which they had already received licenses. *See DLS*, 107 F.3d at 413.

> If they are to be subject to any future threat of injury from actions by the City, that threat will arise under the materially different procedures for renewals or revocations of licenses. . . . Therefore, they cannot demonstrate that their challenge to the licensing procedures satisfies the three core requirements for standing under Article III.

Id.

Metropolitan Nashville misunderstands the plaintiffs' argument. Here, plaintiffs have raised a facial challenge claiming that the Ordinance's procedures for reviewing Board decisions fail to provide for prompt judicial review as required by *Freedman*. The appeal procedures under the Ordinance are essentially identical whether the Board initially refuses to grant a license, or whether the Board suspends or revokes an already-existing license. *See* §§ 6.54.040(E)(2) (procedure for appealing denial of license); 6.54.150(E)(6) (procedure for appealing suspension or revocation of license). Therefore, this case is distinguishable from the *DLS* scenario, where "[a]ny modification to the licensing scheme would have no effect on the potential threat that [the plaintiffs] face under renewal or revocation proceedings." *See DLS*, 107 F.3d at 414.

It is immaterial that Metropolitan Nashville has not yet sought to suspend or revoke the plaintiffs' licenses. A mere threat to First Amendment interests is a legally cognizable injury. *See Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir.1989). "In the area of freedom of expression, it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office . . . whether or not he applied for a license." *Freedman*, 380 U.S. at 56, 85 S.Ct. 734. Arguing that a statute lacks sufficient procedural safeguards is one way to allege overly broad licensing discretion.

> [Plaintiff's] argument is that, because the apparatus operates in a statutory context in which judicial review may be too little and too late, the . . . statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contains the

> same vice as a statute delegating excessive administrative discretion.

Id. at 57, 85 S.Ct. 734. "By the same token, . . . Plaintiff does not have to wait until his license is revoked to have standing to challenge the allegedly overbroad licensing scheme that would allow its revocation." *See G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1075 (6th Cir.1994). Therefore, the plaintiff businesses and operators have standing to raise their facial challenge to the Ordinance.

Additionally, we find this case ripe for review. Ripeness requires that the "injury in fact be certainly impending." *NRA*, 132 F.3d at 280 (citation omitted). The doctrine exists "to ensure that courts decide only existing, substantial controversies, not hypothetical questions or possibilities." *Dixie Fuel Co. v. Comm'r of Soc. Sec.*, 171 F.3d 1052, 1057 (6th Cir.1999) (internal quotation marks and citations omitted). In determining whether the entertainers' claim is ripe, we consider "whether the issues are fit for judicial decision as well as the hardship to the challenging party resulting from potential delay in obtaining judicial decision." *Id.* at 1058.

Metropolitan Nashville claims that the entertainers are not under any threat with regard to the Ordinance because the entertainers have not yet sought a permit. We disagree. The entertainers join with the other plaintiffs in challenging the Ordinance's judicial review provisions. Because this is a purely legal issue, and because, as already demonstrated, the plaintiffs have standing to raise it, the issue is fit for a judicial decision. Moreover, as Metropolitan Nashville acknowledges in its brief, "[p]arties not yet affected by the actual enforcement of the statute are allowed to

challenge actions under the First Amendment in order to ensure that an overbroad statute does not act to 'chill the exercise of free speech and expression,' a constitutionally protected right." Gov. Br. at 12 (citing *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir.1995)). The plaintiffs facially challenge the Ordinance's overbreadth, alleging that the lack of prompt judicial review vests too much discretion in the Board. By Metropolitan Nashville's own admission, then, their claim is ripe for review.

2.

We now turn to the merits of the plaintiffs' claim that the Ordinance constitutes a system of prior restraint, and that it fails to guarantee the requisite prompt judicial review of license/permit denials and revocations. We review a district court's order dissolving a preliminary injunction for an abuse of discretion, reviewing *de novo* where the dissolution is based upon a legal conclusion. *See Reese v. City of Columbus*, 71 F.3d 619, 622 (6th Cir.1995). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard." *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1378 (6th Cir.1995). "A factual or legal error alone may be sufficient to establish that the court abused its discretion in making its final determination." *Id.* (internal punctuation and citations omitted).

A district court must consider four factors when determining whether to grant or deny a preliminary injunction: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff may suffer irreparable harm absent the injunction; (3) whether granting the

injunction will cause substantial harm to others; and (4) the impact of an injunction upon the public interest. *See Dixie Fuel Co.*, 171 F.3d at 1059-60. In First Amendment cases, the first factor will often be determinative. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998). This is because the Supreme Court has recognized that even minimal infringement upon First Amendment values constitutes irreparable injury. *See Newsom*, 888 F.2d at 378. Additionally, if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment. *See Connection Distrib.*, 154 F.3d at 288. Moreover, "it is always in the public interest to prevent violation of a party's constitutional rights." *G & V Lounge, Inc.*, 23 F.3d at 1079. Accordingly, we shall focus our attention on the first factor.

A "prior restraint" exists when the exercise of a First Amendment right depends on the prior approval of public officials. *See Nightclubs, Inc.*, 202 F.3d at 889 (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975)). "Any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *Freedman*, 380 U.S. at 57, 85 S.Ct. 734. In *Freedman*, a unanimous Supreme Court found that three procedural safeguards were required for a prior restraint scheme to avoid constitutional infirmity. *See id.* at 58-59, 85 S.Ct. 734. First, the decision whether or not to grant a license must be made within a specified, brief period, and the status quo must be preserved pending a final judicial determination on the merits. *See id.* at 59, 85 S.Ct. 734. Second, the licensing scheme "must also assure a prompt judicial decision, to minimize the deterrent effect of an

interim and possibly erroneous denial of a license." *Id.* Third, the licensing scheme must place the burden of instituting judicial proceedings and proving that expression is unprotected on the licensor rather than the exhibitor. *See id.* at 58, 85 S.Ct. 734. Li ensing schemes in a city ordinance regulating sexually oriented businesses constitute a prior restraint that must incorporate at least the first two *Freedman* procedural safeguards. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229-30, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (plurality opinion of O'Connor, J.);[5] *see also Nightclubs, Inc.*, 202 F.3d at 890; *East Brooks Books, Inc.*, 48 F.3d at 224.

Sections 6.54.040(E) and 6.54.070(D) of the Ordinance provide the procedures for obtaining relief from the denial of a license or permit:

> Any denial of an application for a license may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may institute proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from

[5] Three justices held only the first two *Freedman* safeguards applied, three justices would have applied all three, *see id.* at 238-39, 110 S.Ct. 596 (Brennan, J., concurring in the judgment), and three more would not have applied any. *See id.* at 244, 110 S.Ct. 596 (White, J., concurring in part and dissenting in part); *see also id.* at 253, 110 S.Ct. 596 (Scalia, J., concurring in part and dissenting in part). Accordingly, at a minimum, we must apply the first two *Freedman* safeguards.

> the date the metropolitan government was served with a petition for a writ of certiorari.[6]
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> Tennessee state law requires that if an appeal is taken from an administrative decision barring an applicant from engaging in First Amendment activities, "the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari." T.C.A. § 27-9-111 (Michie 1999). The plaintiffs argue that these provisions fail to comply with the first two *Freedman* safeguards. We agree.

"Whether the common law writ of certiorari will issue is a matter of discretion. It is not issued as a matter of right." *Boyce v. Williams*, 215 Tenn. 704, 389 S.W.2d 272, 277 (1965). Thus, the Ordinance, in requiring that aggrieved applicants proceed to court via a discretionary route, fails to guarantee a "final judicial adjudication on the merits," as required under *Freedman*'s first safeguard. Metropolitan Nashville points to *State v. Johnson*, 569 S.W.2d 808 (Tenn.1978), for support that Tennessee courts will not deny a writ in this context. *See id.* at 815 (finding that writs should issue where denial of the writ is "tantamount to the denial to either party of a day in court"). Even that case, however, reiterates the rule that "certiorari is a discretionary writ." *Id.* at 814 (noting that whether a lack of appellate remedy exists is "critical" for

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[6] Although this language could be read as authorizing two avenues for appeal, a direct appeal by which Metropolitan Nashville does not have to file the record of all proceedings within ten days, and an appeal via a common law writ of certiorari whereby Metropolitan Nashville must timely file the record, Metropolitan Nashville insisted at oral argument that the provision authorizes only an appeal via the common law writ.

determining whether to grant a writ). Because Metropolitan Nashville has failed to demonstrate that the denial of a writ would be tantamount to the denial to an applicant of a day in court, we cannot agree that this discretionary writ guarantees an aggrieved applicant that a court will hear and decide the merits of her claim, as required by *Freedman.*[7]

Metropolitan Nashville also argues that the plaintiffs' concern that the courts may not promptly determine whether or not to grant the writ petition is unfounded. For support, Metropolitan Nashville cites to an affidavit presented to the district court from the Clerk and Master for the Chancery Courts of Davidson County, stating that "[g]enerally, our office processes all petitions for a writ of certiorari . . . within two days of the filing of the petition." This anecdotal affidavit, however, is insufficient to establish that aggrieved applicants are *guaranteed* prompt judicial review.

First, the affidavit does not address Davidson County's circuit courts, where the Ordinance also directs that an aggrieved applicant's appeal may lie. Therefore, the record is completely absent of any evidence as to the

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[7] Theoretically, for instance, an aggrieved applicant could file a § 1983 suit against the Board and its members. Although such a suit would not provide complete relief, as the applicant would be foreclosed from "speaking" until a final adjudication, it is a far cry from the facts of *Johnson*, where the court found the erroneous suppression of evidence would force Metropolitan Nashville to drop its criminal charges against the defendant and that double jeopardy would prohibit the city from filing new charges. In that context, Metropolitan Nashville would have literally had no legal recourse if the court had denied its petition for a writ of certiorari, and it is therefore at least potentially distinguishable from this case.

turn-around time of petitions filed with the circuit court, and it was clearly erroneous of the district court to find otherwise. More importantly, the affidavit only avers the chancery court's *general* practice. The Constitution requires more. "[A]ny limiting construction must 'be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.'" *Nightclubs, Inc.*, 202 F.3d at 891 n. 6 (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988)). A well-established practice is one where "a well-understood and *uniformly applied* practice has developed that has virtually the force of a judicial construction." *City of Lakewood*, 486 U.S. at 770 n. 11, 108 S.Ct. 2138 (emphasis added). In the absence of such strong evidence, "[w]e can neither presume that municipal officials will act in good faith and respect a speaker's First Amendment rights, nor read a requirement into an ordinance that is not fairly and evidently present." *Nightclubs, Inc.*, 202 F.3d at 891 n. 6. A "uniformly applied" practice is simply not the same as a "generally" applied one. Because the chancery court clerk's affidavit does not present such strong evidence, and because the record contains no evidence as to the circuit court's practices, we cannot agree with the district court that the Constitution's requirements have been satisfied by this proof.

Second, the affidavit purports only to describe the average length of time it takes to "process" all petitions for a writ of certiorari. It says nothing about whether the court is obligated to grant the writ at all, and therefore, it fails to address the biggest problem with the Ordinance's judicial review provision. Without some affirmative evidence showing that every writ of certiorari will be granted,

we find that the Ordinance's judicial review provisions do not guarantee prompt judicial review, as required by the First Amendment.[8] The lack of a judicial review provision renders the entire statute facially unconstitutional, and therefore, severing the ineffectual provision will not save the statute. Under these circumstances, we cannot give effect to the severability clause, but must enjoin enforcement of the entire Ordinance.

III.

In the first of two final matters, the plaintiffs ask us to vacate the magistrate's grant of a protective order to Metropolitan Nashville with regard to the plaintiffs' discovery requests dealing with Metropolitan Nashville's basis for believing sexually oriented businesses cause "secondary effects." The plaintiffs concede, however, that although they moved for the district court to review the magistrate's decision, the court did not rule on the motion before issuing its decisions enjoining the Ordinance's enforcement. We decline to rule on the propriety of the magistrate's order before the district court has a chance to review it.

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[8] The Ordinance does preserve the status quo by allowing existing businesses to continue to operate until an adjudication on the merits and by issuing a temporary license to new businesses if the court fails to rule within forty days of the filing of an appeal. *See* M.C.L. 6.54.040(E)(3) and (4); *see also* M.C.L. 6.54.070(D)(3) and (4) (applying same rules to permit applicants). Merely preserving the status quo, however, is not sufficient to satisfy *Freedman*. The decision whether or not to grant a license must still be made within a specified, brief period, and the licensing scheme "must *assure* a prompt judicial decision." *See Freedman*, 380 U.S. at 59, 85 S.Ct. 734 (emphasis added). The Ordinance's discretionary appeals procedure fails to satisfy these separate requirements.

Finally, we briefly address Metropolitan Nashville's argument that the district court erred in finding that its appeal to this Court divested the district court of jurisdiction to hear its Rule 60(b) motion to dissolve the permanent injunction. The filing of an appeal with this Court generally divests a district court of jurisdiction over the case. *See First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 345 (6th Cir.1976). In the district court's discretion, however, it may enter an order stating that it is disposed to grant a Rule 60(b) motion, which would allow the requesting party to move this Court to remand the case, thereby once again vesting jurisdiction in the district court. *See id.* at 346. Nonetheless, Metropolitan Nashville concedes that the district court is under no obligation to issue such an order, and in fact characterized this appeal as a "procedural misstep" at oral argument. We agree. The district court did not abuse its discretion in refusing to rule on Metropolitan Nashville's Rule 60(b) motion following Metropolitan Nashville's appeal to this Court.

IV.

For the foregoing reasons, we AFFIRM the district court's finding that the definition of "sexually oriented" is unconstitutional under the First Amendment. We further AFFIRM the district court's finding that the definitions of "sexually oriented business/establishment" and "sexually oriented theater," and the no touch/buffer zone provision satisfy the First Amendment. Finally, we AFFIRM the district court's refusal to hear Metropolitan Nashville's Rule 60(b) motion. We REVERSE, however, the district court's finding that the civil disabilities provision, the disclosure provision, and the fee amounts are unconstitutional. We further REVERSE the district court's finding

that the Ordinance's judicial review procedures satisfy the First Amendment. Upon remand, the district court should maintain the injunction until Metropolitan Nashville satisfies it that the constitutional problems with the Ordinance's definition of "sexually oriented" and its judicial review procedures have been corrected.

WELLFORD, Circuit Judge, concurring in part and dissenting in part.

I concur in the Chief Judge's opinion in this difficult case in most respects. I write separately to set out my views with respect to part II.F dealing with standing and prompt judicial review. The majority found that prompt judicial review is "required by *Freedman* [*v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)]." *Supra* at 398. *Freedman*, however, involves a very different set of circumstances from the present controversy, because that case presented a First Amendment challenge to the "Maryland motion picture censorship statute."[1] *Id.* at 52, 85 S.Ct. 734. The Supreme Court pointed out that under the Maryland law in question "there is *no* statutory provision for judicial participation in the procedure which bars a film, *nor even assurance of prompt judicial review*." *Id.* at 55, 85 S.Ct. 734 (emphasis added). Furthermore, the Court recognized the unique nature of the film industry, stating that "a censorship system for motion pictures presents *peculiar dangers* to constitutionally protected speech." *Id.* at 57, 85 S.Ct. 734 (emphasis added). Our present case, of course, does not involve freedom of speech in a film, but

[1] Indeed, in *Freedman*, the state conceded "that the picture [at issue] does not violate the statutory standards." *Freedman*, 380 U.S. at 52, 85 S.Ct. 734.

freedom of expression in a sexually-oriented place of business.

I. *STANDING*

I would not hold *Freedman* controlling on the issue of standing because of the circumstances in that case are entirely different from those in the instant controversy. This court has interpreted *Freedman* broadly to apply to similar types of cases brought by adult "entertainment" operators and performers, such as plaintiffs. For example, *G & V Lounge, Inc. v. Michigan Liquor Control Commission*, 23 F.3d 1071 (6th Cir.1994), cited by the majority, involved "threatened revocation" of a liquor license if topless dancing were to occur at an Inkster, Michigan bar and nightclub. *G & V Lounge, Inc.*, 23 F.3d at 1073. With that scenario and the evidence of threatened and imminent action by the state of license revocation, this court held that plaintiff operator had standing to bring a First Amendment claim, citing Supreme Court authority, including *Freedman*. Standing would be present in such a situation even if no revocation had taken place.

In the instant case, however, the plaintiffs make no allegation of threatened revocation of their licenses (or actual censorship). The majority recognizes Metropolitan Nashville's argument "that the plaintiff businesses and operators have no standing to challenge the license procedures because they have all been issued licenses." What it fails to recognize, however, is that no plaintiff has been threatened with revocation under the ordinance. Metropolitan Nashville concedes that "parties not yet affected by actual enforcement of the statute are allowed to challenge actions under the First Amendment." It is doubtful,

however, particularly in light of *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir.1997), that the plaintiffs, not operating under any threat of revocation, would have standing to challenge the constitutionality of procedures involved in the Ordinance at issue.

I would hold that plaintiffs have standing to challenge the substantive criteria for the issuance of licenses or permits, but do not have standing to challenge "the licensing scheme." *See DLS*, 107 F.3d at 413. In *DLS*, we reasoned that the plaintiffs lacked such standing because they "already have succeeded in obtaining a license under [the applicable ordinance]. If they are to be subject to any future threat of injury from actions by the City, that threat will arise under the materially different procedures for renewals or revocations of licenses under [different provisions]." *Id.* I am not persuaded that, in the instant case, the procedures involved for revocation are not different from the procedures required for applying for initial licenses.

I find neither *Newsom v. Norris*, 888 F.2d 371 (6th Cir.1989), nor *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th cir.1995), both cited in the majority opinion, to be particularly helpful to plaintiffs on the issue of standing. *Newsom* involved a prison setting and alleged retaliation against inmate advisors. *Dambrot* involved a university's alleged discriminatory harassment policy in a discharge situation addressing the issue of freedom of speech. Neither case involved the type of expression here involved, held repeatedly to be subject to reasonable, narrowly drawn state regulation.

FW/PBS is a case much more analogous to this case than *Freedman*. The city ordinance in *FW/PBS* purported

to regulate businesses similar to those operated by plaintiffs in this case. Plaintiffs were permitted to raise a facial challenge to the ordinance because special inspections and certificates of occupancy were demanded of sexually-oriented businesses. Such provisions are absent from the Metropolitan Nashville ordinance.

II. *PROMPT JUDICIAL REVIEW*

The Court in *Freedman* emphasized that the censorship of a film "puts an initial burden on the exhibition."[2] *Id.* Again, this is not the situation in the instant controversy. In the film censorship area, *Freedman* mandated a procedure "which must . . . assure a prompt final judicial decision." *Id.* at 59, 85 S.Ct. 734. The Supreme Court emphasized the need for prompt judicial review of film censorship laws, recognizing that in the Maryland scheme there was "*no assurance* of prompt judicial determination." *Id.* at 60, 85 S.Ct. 734 (emphasis added). Apparently, the scheme contained no provision for judicial review of film censorship, an entirely different circumstance from the instant case. Whether or not there is an adequate provision for prompt judicial review in these circumstances is a legal question and forms a basis for injunctive relief if it is wanting. The legality of prior restraints of freedom of expression in adult sexually-oriented businesses, while not illegal per se, requires the special attention of this court. *FW/PBS*, 493 U.S. at 225-26, 110 S.Ct. 596. To be constitutional, a prior restraint must place reasonable and prompt time constraints on the administrative process of issuing

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[2] "Films differ from other forms of expression." *Freedman*, 380 U.S. at 61, 85 S.Ct. 734.

business licenses and permits and must provide "expeditious judicial review" of administrative decisions. *Id.* at 227, 110 S.Ct. 596 (citing *Freedman*, 380 U.S. at 58-60, 85 S.Ct. 734).[3]

The Court in *FW/PBS* mandated that any such licensing scheme provide for the "*possibility* of prompt judicial review in the event that the license is erroneously denied." *Id.* at 228, 110 S.Ct. 596 (emphasis added). The Court also relied on the specific circumstances of that case in holding that, unlike *Freedman*, the city did not have the burden of proof once in court. *Id.* at 230, 85 S.Ct. 734. The question of prompt judicial review of the license permit action was whether there were "adequate bulwarks."[4] *Id.* Moreover, the Court in *FW/PBS* raised on its own volition the question of standing of certain plaintiffs who challenged the civil disability provision of the ordinance. *Id.* at 234-35, 110 S.Ct. 596. The Court held that there was no standing to challenge revocation on the basis of past criminal conviction or conduct where no petitioner actually demonstrated revocation of a license under the civil disability provision. *Id.* at 235, 110 S.Ct. 596.

I believe that the Ordinance at issue does meet the standards set out in *FW/PBS*, because it provides for much more than a "possibility" of prompt judicial review. Sections 6.54.04(E) and 6.54.070(D) of the ordinance specify

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[3] *FW/PBS* makes it clear that the "licensing scheme" in this type of case "does not present the grave dangers of a censorship system" that was present in *Freedman*. *FW/PBS*, 493 U.S. at 228, 110 S.Ct. 596.

[4] The authority cited for this proposition was *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1962), a book censorship case. The Rhode Island law at issue in *Sullivan* provided for no judicial review.

certain procedures for obtaining relief from denial of a license or permit. First, a denial "*may be* immediately appealed to the circuit or chancery courts of Davidson County." (Emphasis added.) There is no requirement in the ordinance as to the form of relief that may be sought by the unsuccessful applicant.[5] There is no reason why an applicant may not pursue a declaratory judgment action or seek injunctive relief if a constitutional issue is claimed to be involved in either state or federal court because of an asserted invalid or improper denial. If the applicant, under the above sections of the ordinance, does choose to appeal by seeking a writ of certiorari, he or she is provided with a prompt record and an opportunity to challenge the procedures involved in a denial. Contrary to the Chief Judge, I believe that *State v. Johnson*, 569 S.W.2d 808 (Tenn.1978), does support the proposition that Tennessee court would entertain a petition for a writ of certiorari from denial of an application even if the action taken were discretionary in nature.

I respectfully disagree with the statement by the majority in footnote 7, because temporary injunctive relief or mandamus could issue in a § 1983 suit against Metropolitan Nashville if an application were denied based on, for example, racial, sexual, or other illegal discriminatory animus, thus allowing the plaintiff to "speak" pending final adjudication. Furthermore, under the majority holding of *FW/PBS*, I believe that a rejected applicant has the opportunity for an adequate and expeditious judicial review based upon available remedies, as supported also

[5] Despite any purported argument made to the effect that appeal by writ of certiorari is the only statutory avenue of relief upon denial of an application, the ordinance speaks for itself in this regard.

by the affidavit of the Clerk of the Davidson County Chancery Court. There is a sufficient protection in such an event of denial of a meritorious application under the ordinance and the proof for prompt judicial review; in short, there is an "adequate bulwark" by judicial review available. The majority opinion states in footnote 8 that "[t]he ordinance does preserve the status quo by allowing existing businesses to continue to operate *until an adjudication on the merits* and by issuing a temporary license to new businesses if the court fails to rule within forty days of the filing of an appeal." (Emphasis added.) I agree with this interpretation of the effect of the ordinance, and this also presents an adequate and reasonable bulwark constitutionally, in my view.

In sum, I respectfully disagree that there is, in this ordinance, "lack of judicial review provision." There is not only such a provision but there is also a reasonable stay provision to protect a plaintiff pending judicial review. We are not dealing in this case with censorship, or attempted censorship, of speech, books, or films (as in *Freedman, supra*).

Finally, even if the judicial review provisions were inadequate, I would conclude that the severance provision in the ordinance is effective, and I would not agree to void enforcement of the entire ordinance because of perceived insufficient means of prompt judicial review.[6]

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[6] A case cited as giving support to the majority view is a four-to-three decision of the court, *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988), which permitted a facial challenge to a municipal ordinance regulating newspaper racks on city streets. The later case of *FW/PBS* states the principle applicable in this situation: "Limitation on the time within which the licensor

(Continued on following page)

Accordingly, I respectfully dissent from parts of the majority decision for the reasons indicated.

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must issue the license as well as the availability of prompt judicial review satisfy the 'principle that the freedoms of expression must be ringed about with adequate bulwarks.'" *FW/PBS*, 493 U.S. at 230, 110 S.Ct. 596.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al.	
v.	No. 3:97-1066
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.	Chief Judge Nixon

MEMORANDUM

(Entered December 8, 1997)

Pending before the Court is the Plaintiffs' Motion for Preliminary Injunction (Doc. No. 2), to which the Defendants have filed a Response (Doc. No. 19). Also pending is the Motion by Jerry C. Pendergrass and others to intervene (Doc. No. 11). The same parties seeking to intervene in this action subsequently initiated their own action, alleging similar harms: Pendergrass v. Metropolitan Government of Nashville and Davidson County, Case No. 3:97-1176. The Plaintiffs in this later action have also filed a Motion for Preliminary Injunction (Doc. No. 3). Because these two cases present similar issues of law and fact, such that consolidation would further judicial economy and impose no prejudice upon the parties, the Court hereby orders that the two actions be consolidated. Accordingly, the motion to intervene is now moot and the Plaintiffs' respective motions for a preliminary injunction will be treated jointly. The Court held a hearing on December 1, 1997, during which time the parties had an opportunity to present evidence and argue their positions.

After reviewing the record, the Court finds that the Plaintiffs have satisfied their burden of proving the elements necessary for a prelimnary injunction, and orders that the Defendants be hereby enjoined from enforcing any of the provisions of Chapter 6.54 of the Metropolitan Code of Laws.

I. BACKGROUND

The Plaintiffs are a group of establishments and individuals which provide adult public entertainment in the form of live nude and/or semi-nude performance dance entertainment in a club environment, and operate adult theaters and bookstores. They are seeking to enjoin a regulatory scheme enacted by the Council of the Metropolitan Government of Nashville and Davidson County on August 19, 1997, which requires "sexually oriented businesses" to obtain licenses before being permitted to operate, and adult entertainers employed in these establishments to also obtain permits in order to perform. The mayor approved the ordinance on August 25, 1997, and it took effect on November 1, 1997. Existing business have one hundred and twenty days after November 1st to apply for a license, Nashville and Davidson County, Tenn., Code § 6.54.030(F) (Supp. Sept. 1997), and entertainers have forty-five days from that date to apply for a permit, § 6.54.060(B).

The ordinance specifically requires partners in a partnership who participate in the day-to-day running of a sexually oriented business, majority stockholders of such businesses, and any officers or directors of such businesses (collectively "operators"), to obtain licenses to operate issued by a specially established board. § 6.54.010(S). The term "sexually oriented business" as defined by the ordinance

includes bookstores, video stores, theaters, and nightclubs which "regularly present[] material or exhibitions distinguished or characterized by an emphasis on matter depicting . . 'specified sexual activities' or "specified anatomical areas.'" § 6.54.010(S)(1)-(4). The application for a license requires the operators to provide such information as addresses, employment history, criminal violations of a sexual nature or involving moral turpitude, fingerprints, citations of zoning code violations, and diagrams of booth, stalls, and cubicles. §§ 6.54.040(A)(5)-(6), 6.54.070(A)(2). Applicants who have been convicted or pleaded nolo contendere to a crime of a sexual nature or involving moral turpitude are prohibited from obtaining licenses for specified periods of time, two years from the date of conviction for a misdemeanor, and five years from the date of conviction for a felony. §§ 6.54.040(C)(2)(a)-(b), 6.54.070(A)(9). Similar requirements apply for entertainers seeking to obtain a permit. Licenses must be renewed on a yearly basis, and can be revoked for a variety of reasons specifically prescribed in the statute, including discovery that an operator employs an entertainer who does not have a permit, or furnishes sexually explicit material to minors. § 6.54.100, § 6.54.140.

Once the application is received, the board must distribute a copy of the application "promptly" to the police department, the department of codes and administration, the health department, the fire department, and the applicant. § 6.54.040(A)(1). The departments are required to conduct inspections and to provide the reports to the board within thirty days of receipt of the application. § 6.54.040(B)(3). The board is then required to make its determination within twenty days of receiving these reports. §6.54.040(C)(1). However, if the board needs

additional information, or is awaiting out-of-state documentation, it may hold the application for an additional thirty days before issuing its initial decision. § 6.54.040(C)(7).

The ordinance makes provisions for the appeal of unfavorable decisions. In the case of both operators and entertainers, if the license is denied, the applicant has the right to request a hearing within ten days of notification of the decision. §§ 6.54.040(E)(1), 6.54.070(D)(6). Once the request is received, the board is required to schedule a hearing at its next meeting, during which time it hears evidence presented by the applicant and issues its final decision.[1] §§ 6.54.040(E)(1)(b), 6.54.070(D)(6)(b). The denial of a license is required to be mailed within ten days to the applicant's address. §§ 6.54.040(E)(1)(e), 6.54.070(D)(6)(e). An appeal of this decision may be made directly to the Chancery Court for the state of Tennessee. §§ 6.54.040(E)(2), 6.54.070(D)(7). The metropolitan government department of law may institute proceedings for a declaratory judgment. *Id.* In addition, the ordinance permits an applicant to appeal by filing a petition for a writ of certiorari, in which case the board must submit all records of the proceedings before it to the court within ten days. *Id.*

II. DISCUSSION

In order to determine the propriety of injunctive relief, the court must look to the following factors: (1) the likelihood of the movant's success on the merits; (2) the irreparable harm that could result if the injunction is not

[1] The board is required to meet twice per month. § 6.54.020(D)(1). Board Policy No. 10 dictates that the board must meet the second and fourth Tuesdays of every month.

issued; (3) the impact on the public interest of granting or denying the injunction; and (4) the possibility of substantial harm to others if the injunction is issued. *G & V Lounge, Inc., v. Michigan Liquor Control Comm'n,* 23 F.3d 1071, 1076 (6th Cir. 1994). Sixth Circuit precedent makes it clear that these four factors are not absolute prerequisites, but must rather be balanced by the Court. *Performance Unlimited v. Questar Pubs., Inc.,* 52 F.3d 1373, 1381 (6th Cir. 1993) (citing In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985)). If a party demonstrates substantial likelihood of success on the merits, the three other factors will favor the party as well. *Planned Parenthood Ass'n v. McWherter,* 716 F. Supp. 1064, 1066 (M.D. Tenn. 1980); *cf. Performance Unlimited,* 52 F.3d at 1385-86 (quoting Merrill Lunch, Pierce, Fenner & Smith, 836 F. Supp. 428, 432 (W.D. Mich. 1993) (citation omitted)). The Court will therefore focus its inquiry upon the first factor, although it will also discuss the others in turn.

A. Likelihood of Success on the Merits

For the purpose of the preliminary injunction, the Plaintiffs have limited their motion to two issues, first, they challenge the ordinance on its face because it fails to provide for prompt judicial review of the board's decision, and second, they challenge the disabling provisions of the ordinance.

Although facial challenges to a licensing scheme are disfavored, they are permitted in the First Amendment context when the licensing scheme is challenged as permitting undue delay, "such that 'every application of the statute create[s] an impermissible risk of suppression of ideas,'" as is the case here. *FW/PBS, Inc. v. City of Dallas,*

493 U.S. 215, 223-24 (1990) (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798, n. 15 (1984)). Licensing schemes such as the one at issue are subject to prior restraint First Amendment constitutional analysis. While there is a "heavy presumption against [their] constitutionality," *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 225 (1990) (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 562 (1975)), such a system will be upheld if it incorporates certain procedural safeguards. *Freedman v. Maryland,* 38 U.S. 51, 58 85 S.Ct. 734 (1965). Specifically, the decision-maker must not be given unlimited discretion so as to risk suppression of protected speech. *FW/PBS*, 493 U.S. at 225026. An ordinance which does not restrict the time in which a decision must be made is a form of such unbridled discretion. *East Brooks Books v. City of Memphis*, 48 F.3d 220, 224 (6th Cir. 1995). Accordingly, a statute must impose restraints in advance of a final judicial determination for only a brief period time, preserve the status quo during that time, and afford expeditious judicial review. *Id.* at 224.

1. Undue Delay

The Plaintiffs allege that this ordinance fails to meet these promptness requirements for three reasons. First, it allows for a wait of almost one hundred days before an appeals hearing is conducted. This includes a one day wait for the board to distribute the application;[2] thirty days for

[2] Although the statute itself only requires that the board distribute the application promptly, the board has interpreted this to mean that the application should be distributed the same day they are received, or the following business day if received after 4:00 p.m. Board Policy No. 5. For the purposes of this motion, the Court will accept the board's interpretation.

the departments to conduct their inspections; twenty days for the board to make its determination; in certain circumstances, an additional thirty days for the board to act; one day for the applicant to request an appeals hearing (assuming he or she acts promptly); and fourteen days for the board to meet and hold the hearing. The Plaintiffs claim that this delay exceeds the sixty-day delay in *East Brooks Books*, which the Sixth Circuit held was unconstitutional.

The Defendants maintain that the ordinance places brief and specified time periods on the board to act on the application. They calculate the time period in which an initial decision is made differently, without including the time required to hold a hearing on appeal before the board. They point out that the ordinance imposes only an eighty-one-day waiting period before the initial determination by the board, and that this is close to the sixty-day period which was upheld in *DLS, Inc. v. City of Chattanooga*, 894 F. Supp. 1140 (E.D. Tenn. 1995), and *Ellwest Stereo Theater, Inc. v. Boxer*, 718 F. Supp. 1553, 1570 (M.D. Tenn. 1989).

However, neither *East Brooks Books, DLS,* or *Ellwest* are directly on point with respect to this issue. The opinion in *Ellwest* does not even reach the issue of whether the length of time given to a decision-maker to issue a license suppresses free speech. Similarly, the court in *East Brooks Books* did not discuss whether the time given to the decision-makers to issue a license was not constrained and therefore a form of unbridled discretion. Rather, the court focused on whether there was prompt judicial review of the licensing decisions. *See East Brooks Books,* 48 F.3d at 224-225. The Supreme Court in *FW/PBS* has made clear however, that these are two separate inquiries. First, the ordinance must place limits on the time during which the

decision to issue a license is made, and preserve the status quo during that time, and second, there must also be prompt judicial review of this decision. *FW/PBS,* 493 U.S. at 227. Finally, while the district court in DLS did discuss the issue of whether the licensing ordinance sufficiently limited the time in which the decision-maker must determine whether to issue a license, the Sixth Circuit on appeal did not touch upon the issue. This was because the Sixth Circuit determined that the Plaintiffs did not have sanding to challenge the licensing scheme. *See DLS, Inc. v. City of Chattanooga,* 107 F.3d 403, 413 (6th Cir. 1997). Thus, since the district court erroneously concluded that the plaintiffs had standing to challenge the licensing scheme, any decision that it made with respect to this issue is dicta.

Accordingly, the most recent and direct authority on this issue is the Supreme Court decision in *FW/PBS.* In that case, Justice O'Connor[3] determined that the licensing scheme at issue in that case should be struck down because it allowed for an "indefinite postponement of the issuance of a license." *FW/PBS,* 493 U.S. at 227. This was so because although the ordinance required the chief of police to rule on the issuance of a license within thirty days after the receipt of the application, a license could not be issued without the approval of other departments. *Id.*

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[3] Only two other Justices, Stevens and Kennedy, joined in this part of Justice O'Connor's opinion. However, Justices Brennan, Marshall, and Blackmum in their concurrence agreed with the aspects of Justice O'Connor's opinion that are at issue here. These Justices' only disagreement with O'Connor's opinion was with her determination that the government need not bear the burden of effecting the denial of a license in court, or bear the burden of proof once in court. *See FW/PBS,* 493 U.S at 439-42

The ordinance did not limit the time during which these departments were required to make their inspections. *Id.*

The ordinance presently at issue has a sufficiently circumscribed time limit for the issuance of a license or permit. The only indeterminate time allowance in the ordinance is the provision that directs the board to distribute the application, when first received, "promptly" to the various departments that need to conduct inspections. § 6.54.040(A)(1). However, the board has sufficiently cured this by adopting a policy which requires them to distribute the application at the latest by the next business day. Board Rule 5. The Plaintiffs nevertheless maintain that the waiting period, even if sufficiently specified, is too long to constitute a "reasonable time period." *See East Brooks Books,* 48 F.3d at 224. "The reasonableness of the time period during which a restraint on speech may operate prior to judicial review 'may vary in different contexts.'" *11126 Baltimore v. Prince George's County, MD,* 58 F.3d 988, 997 (4th Cir. 1995) (quoting United States v. Thirty-Seven Photographs, 402 U.S. 363, 374 (1971)). The court should take into account "the type of judgments to be made by the government officials and the hardship placed on the class of applicants by the restraint." *Id.* (citation omitted).

As an initial matter, it should be noted that the time period in which an initial decision must be made does not include the time it takes to appeal or obtain a hearing at the administrative level. The Sixth Circuit made this clear in *East Brooks Books,* when it included the time required to obtain a hearing before the Chief of Police in its computation of the time it took to obtain *judicial review* of the ordinance. *East Brooks Books,* 48 F.3d at 225. That said, it appears from review of other decisions that the time it

takes to obtain an initial licensing determination under the ordinance presently at issue is at the borderline of constitutionality. *See, e.g., 1126 Baltimore,* 58 F.3d at 997 (150-day delay is not a reasonably brief time); *TK's Video, Inc. v. Denton County, Tex.,* 24 F.3d 705, 708 (5th Cir. 1994) (upholding 60-day waiting period); *Chesapeake B & M, Inc. v. Hartford County, Md.,* 831 F. Supp. 1241, 1249-50 (D. Md. 1993) (upholding 44-day waiting period), *rev'd in part, vacated in part, and remanded on other grounds,* 58 F.3d 1005 (4th Cir. 1995) (en banc); *Wolff v. City of Monticello,* 803 F. Supp. 1568, 1574 (D. Minn. 1992) (90-day waiting period not unreasonable). However, considering that the applications must be distributed to other departments for inspections, that the board may only hold the applications for thirty of those days under specified circumstances, and that businesses already established can continue operating pending a licensing decision, the Court finds that this waiting period is not unreasonable.

2. Status Quo

However, not only must the waiting period be reasonable, but the status quo must be preserved during that time. *East Brooks Books,* 48 F.3d at 224. The Plaintiffs' second challenge to the ordinance relates to this issue. They claim that the ordinance does not provide for the preservation of the status quo pending judicial review, or in the event that the board fails to issue a timely licensing opinion. The Court agrees. Section 6.54.140 of the ordinance, combined with Section 6.54.020(G)(3) provide for only a ten-day hiatus before the board's decision takes effect. Section 6.54.140 provides that a license/permit shall be valid until ten days have elapsed since the board's

decision, or until a hearing on the matter is held. If at the conclusion of the hearing, the board affirms its denial of license or permit, this decision does not take effect until ten days have elapsed, in order to give the aggrieved party time to file an appeal. Section 6.54.020(G)(3). The ordinance is silent as to whether the effect of a denial is stayed after those ten days pending judicial review. The board's policies are equally silent on this issue. Although Board Policy 40 states that any denial, revocation, or suspension of a license shall not go into effect until thirty days have elapsed since the board's final decision and there has been no appeal, it does not explain what the status of a license is while an appeal is pending.

Furthermore, the ordinance does not specify what the effect would be of the board's failure to act on an application in a timely manner. The Defendants have presented the Court with Board Policy 70, which states in relevant part:

> It shall be the policy of this Board that any license or permit not acted on by the Board in the time allowed by the ordinance, due to any fault on the part of the Board or the Board's administration, shall be granted.

Def's Ex. 2 at 2. However, as the Plaintiffs have pointed out, the policy only relates to failure to act on an application due to fault by the Board. It does not encompass failure to act timely due to failure of, for example, the police or fire department to conduct its investigation within the prescribed thirty days. Moreover, this policy is inconsistent with Section 6.54.020(C)(10), which prohibits the board from issuing a license "unless the police department has investigated the applicant's criminal history . . . ". Finally, it is unclear from the policy just how

a license would be granted if the reason a license has not been issued on time is that the board has not been able to meet or to form a quorum.[4] Without any action on the part of the board, the applicant will presumably not have a tangible permit in his or her possession.

3. Judicial Review

Lastly, the Plaintiffs contend that the ordinance is invalid because it fails to provide for prompt judicial review. Again, the Court agrees with the Plaintiffs. Under the ordinance as written, an applicant can be required to wait for an indefinite period of time before obtaining judicial review of the board's decision. After a hearing is requested, the applicant should receive a hearing in fourteen days, since the board holds meetings bimonthly. § 6.54.020(D)(1). The board must then notify an applicant of the denial of his or her license within ten days after a meeting is conducted. The ordinance specifies that the applicant can then appeal from an unfavorable decision at a hearing directly to the Chancery Court of Davidson County through a petition for a writ of certiorari. § 6.54.160. The administrative record must be transmitted to the court within ten days of the hearing, § 6.54.160, however, a hearing before the court must wait at least ninety days in order to allow for the filing of a brief, response, and reply brief. Davidson County Local Rule § 30.02. Although the appeal would at that point have precedence over other matters before the court, the scheduling of a hearing is dependent on the court's docket.

[4] Board Policy 20 requires that a quorum must be present in order for the board to take action

Thus, the Plaintiffs are not guaranteed judicial review within any specified period of time. Moreover, the state chancellor is not required to issue an opinion within any mandated period of time. *See* Tenn. Code Ann. § 27-9-111.

The circuits are currently split with respect to the meaning of "prompt judicial review." The First, Fifth, and Seventh Circuits have concluded that access to a judicial proceeding is sufficient to constitute prompt judicial review. J. David Guerrera, Note, *Constitutional Law: The Meaning of Prompt Judicial Review Under the Prior Restraint Doctrine After FW/PBS v. City of Dallas*, 62 Brook. L. Rev., 1217, 1220 (1996). Conversely, the Fourth, Sixth, and Eleventh Circuits have required a prompt judicial *determination. Id.* at 1241-42. In *East Brooks Books*, the Sixth Circuit concluded that a potential wait of over five months before a judicial ruling was impermissible. 48 F.3d at 225. It further determined that the possibility of appeal to the Tennessee state courts through a writ of certiorari did not constitute prompt judicial review precisely because this procedure did not require the courts to issue a ruling within any specified period of time. *Id.* The ordinance at issue in the present case allows for up to fifteen days for the board to hold a hearing (one day to request and fourteen days for the hearing to be held), ten days before the denial is mailed to the applicant, ten days for the board to forward a copy of the proceedings before it to the court, and a wait of at least ninety days before a state court can issue a ruling. The applicant must thus wait at least three and one-half months minimum before a court issues a ruling on its application. However, since there are no time restraints on the court's issuance of a decision, potential delays of over five months are possible under this statute. *East Brooks Books* prohibits this kind

of delay. *See also Smith v. City of Clarksville*, No. 3-94-0539 (M.D. Tenn. Mar. 14, 1996) (invalidating a licensing scheme similar to the one at issue because it failed to provide for expeditious judicial review).

The Defendants offer three possible ways to rehabilitate this ordinance. First, they contend that under the local rules, it is possible for an applicant to move the Chancery Court for an expedited briefing schedule, and pursuant to Local Rule 18.01[5], move the court to set an early trial date. They contend that while Tenn. Code Ann. § 27-9-111 provides that in appeals of board determinations, the court shall set a trial ninety days after the board files a transcript of the proceedings before it, and that the trial shall have precedence over other litigation, this statute does not *require* a court to wait ninety days before setting a case for trial. They further assert that to the extent that it does mandate this, it violates the separation of powers doctrine, as it infringes upon the court's ability to set its own docket. *See Summers v. Thompson*, 764 S.W.2d 182, 188-190 (Tenn. 1988) (Drowota, J., concurring) (discussing generally the respective powers of the judiciary and the legislature). However, it is clear that the Defendants' proposed method of judicial review would not set clear boundaries on the time that a court must make a decision, and thus does no pass constitutional muster under *East Brooks Books*.

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[5] The rule provides: "Cases shall be set for trial in one of the following ways: (a) by agreement of counsel after consultation with the Calendar Clerk for Chancery and Probate Court or the Assignment Clerk for Circuit Court; (b) by motion; or (c) by the court with notice to counsel."

Second, the Defendants contend that, unlike the ordinance in *Smith v. City of Clarksville*, the ordinance at issue does not require that any appeal be processed through a writ of certiorari at the state level. Although the ordinance at hand does provide that an applicant may "choose" to appeal to the state through a writ of certiorari, § 6.54.100(M), the ordinance by its terms does not foreclose other methods of appeal. Specifically, the Defendants maintain that an applicant can appeal by petitioning for a temporary restraining order ("TRO") and preliminary injunction. However, again, the Defendants have not directed the Court to any rule which requires a court to decide a motion for a TRO or preliminary injunction within any prescribed period of time. Thus, this procedure suffers from the same infirmities as a petition for writ of certiorari.

Finally, the Defendants have submitted to the Court Proposed New Local Rule, § 30.05, which provides that:

> If the petitioner-appellant alleges that the decision of an administrative tribunal or agency unlawfully results in the prior restraint of his or her rights that are guaranteed by the First Amendment to the U.S. Constitution, and either party requests an expedited hearing, the court shall immediately schedule a hearing, establish an expedited briefing schedule that will permit the court to adjudicate the matter promptly, and in no event later than fourteen days after the record is filed.

However, the proposed rule suffers from several problems, the most important of which is that it is *a proposed* rule, and there is no guarantee that it will be adopted by the courts. Furthermore, the text of the rule is unclear, as it

does not specify exactly *what* must be done in fourteen days: the scheduling of a hearing, and adjudication, or both. Thus, the Court cannot conclude that this local rule meets the expeditious judicial review requirements of the First Amendment. That aside, it appears to the Court that this kind of rule is exactly what must be promulgated in order to satisfy the judicial review requirements under the prior restraint doctrine. Although the legislature may not be able to require the courts to decide a matter within a prescribed period of time, the directives of the First Amendment may still be met if an ordinance provides that a permit or license should issue in the event that the court does not adjudicate a matter within a given time (which must be less than five months per *East Brooks Books*).

4. Disabling Provisions

Because the Court has determined that the ordinance is unconstitutional because it does not preserve the status quo or provide for prompt judicial review, it does not need to reach the issue of whether the disabling provisions of the ordinance are unconstitutional.

B. Irreparable Harm

Nonobscene nude dancing is constitutionally-protected activity within the scope of the First Amendment. *Barnes v. Glen Theatres, Inc.*, 501 U.S. 560, 565-66 (1991); *G&V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d at 1075. The ordinance, if allowed to take effect, would condition the Plaintiff's exercise of their First Amendment freedoms on the receipt of a license, and would prohibit them from exercising this right without a license. It is well-established that "[t]he loss of First Amendment

freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The Defendants have urged this Court to find that there is no immediate irreparable injury because operators do not even have to file an application until March of next year, and although entertainers must file their applications by November 15th of this year, the board will not rule on their applications until, at the earliest, fifty days later. However, in the case of entertainers, the mere fact that they have to file an appliation infringes on their First Amendment freedoms, since the application requires them to submit a picture, a list of prior employers, prior addresses, and prior convictions of a sexual nature or involving moral turpitude. Furthermore, since the ordinance is already in effect, operators are already subject to it and live under the threat of having to submit licenses to the board. The Court finds that this is sufficient immediate irreparable harm for it to enjoin the provisions of the ordinance relating to operators.

C. Public Interest

The Court finds that the issuance of an injunction at this point would be in the public interest: it "is always in the pubic interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc.*, 23 F.3d at 1079. Although it is also in the public interest to ameliorate the harmful side effects that sexually-oriented businesses may promote, as specified in the preamble to the ordinance, it is not in the public interest to do this through a statute that violates an individual's First Amendment rights.

D. Possibility of Substantial Harm to Others

There is very little possibility of substantial harm to others if the injunction is not issued. Although the ordinance is directed at curtailing certain crimes and health hazards which are the "secondary effects of adult entertainment establishments," *see* Bill No.097-796, there are other means of regulating these effects that will continue to operate while the injunction is in effect, for example, the police and fire departments.

III. CONCLUSION

The Court finds that the ordinance must be enjoined in its entirety because it fails to maintain the status quo while an initial determination of the board is pending, and does not provide for prompt judicial review. Although the ordinance is severable, § 56.54.170, the fact that it fails to provide expeditious judicial review requires the Court to invalidate it in its entirety, as none of the provisions are salvageable. Accordingly, the Metropolitan Government of Nashville and Davidson County Tennessee, and Emmett Turner, Chief of Police, are enjoined from enforcing any of the provisions of this ordinance until otherwise directed by this Court.

An order consistent with this memorandum will be filed contemporaneously.

Entered this the 5th day of December, 1997.

/s/ John T. Nixon
JOHN T. NIXON,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al. v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.	No. 3:97-1066 Chief Judge Nixon

ORDER

(Entered December 8, 1997)

Pending before the Court is the Plaintiffs' Motion for Preliminary Injunction (Doc. No. 2), to which the Defendants have filed a Response (Doc. No. 19). Also pending is the Motion by Jerry C. Pendergrass and others to intervene (Doc. No. 11). The same parties seeking to intervene in this action subsequently initiated their own action, alleging similar harms: Pendergrass v. Metropolitan Government of Nashville and Davidson County, Case No. 3:97-1176. The Plaintiffs in this later action have also filed a Motion for Preliminary Injunction (Doc. No. 3). Because these two cases present similar issues of law and fact, such that consolidation would further judicial economy and impose no prejudice upon the parties, the Court hereby ORDERS that the two actions be consolidated. Accordingly, the motion to intervene is now moot and the Plaintiffs' respective motions for a preliminary injunction will be treated jointly.

After reviewing the record, the Court finds that the Plaintiffs' Motion for a Preliminary Injunction should be GRANTED. It is ORDERED that the Defendants, Metropolitan Government of Nashville and Davidson County, and Emmett Turner, Chief of Police, are hereby prohibited from enforcing any of the provisions of Chapter 6.54 of the Nashville and Davidson County, Tenn. Code of Laws until otherwise directed by the Court.

It is so ORDERED.

Entered this the 5th day of December, 1997.

/s/ John T. Nixon
JOHN T. NIXON,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. a Tennessee Corporation; MICHAEL RUCKER, individually; MICHAEL BUTLER, individually; MERONEY ENTERTAINMENT, INC., d/b/a KEN'S GOLD CLUB, a Tennessee corporation, THE PLEASURE PALACE, INC. a Tennessee corporation; CAROUSEL AMUSEMENT CENTER, INC., a Tennessee corporation; DAWN PIERCE and ELIZABETH MARTZ, individually,

Plaintiffs,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; EMMITT TURNER, Chief of Police of the Metro Police Department

Defendants.

and

CIVIL ACTION NO.
3-97-1066

JUDGE NIXON

MAGISTRATE JUDGE
GRIFFIN

JERRY C. PENDERGRASS,
THE 822 CORPORATION,
and 421 CORPORATION,

Plaintiffs,

CIVIL ACTION NO.
3-97-1176

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Defendant.

CASE MANAGEMENT ORDER

(Entered March 5, 1998)

Pursuant to Rule 11(d) of the local rules of this Honorable Court, the following is adopted as the Case Management Plan.

1. Service of process has been completed in Civil Action No. 3-97-1066 and the return filed with the Clerk.

2. Answers have been filed on behalf of both Defendants in Civil Action No. 3-97-1066.

3. Limited discovery will be needed in the following areas:

a. Legislative history of the debate and ultimate enactment of Metropolitan Ordinance No. 097-796.

b. Documents, studies or other evidence filed with the Metropolitan Council or any committees thereof relating to its consideration of Metropolitan Ordinance No. 097-796, including secondary effects of adult entertainment

establishments and any nexus between the Ordinance and perceived secondary effects.

c. Discovery by way of oral deposition and/or written interrogatories as to any and all members of the Metropolitan Council, or the staff thereof or of the Metropolitan Government having knowledge about any documents, studies or other information received by them concerning Metropolitan Ordinance No. 097-796, as finally adopted, or any of the earlier forms or previous amendments thereto.

d. Defendants will oppose any attempt to take discovery from individual members of the Metropolitan Council or its staff. Defendants will likely take the depositions of the individual plaintiffs, and representatives of the corporate plaintiffs. Defendants may additionally seek written discovery.

4. There are no prospects for settlement of this litigation in that it is a matter involving constitutional interpretation of Metropolitan Ordinance No. 097-796 which Plaintiffs have alleged imposes regulations which are in violation of their constitutional rights which could only be remedied by modification or repeal of the Ordinance by the Metropolitan Council, or by action of this Court.

5. The parties see no need for adopting special procedures as suggested in Local Rule 11(d)(5).

6. (a) The constitutional issues presented in this case are whether Metropolitan Ordinance No. 097-796 violates free speech provisions of state and federal constitutions, violates equal protection provisions of state and federal constitutions and whether said Ordinance violates

due process. Other issues will be Plaintiff's attorneys' fees and the standing of Plaintiffs to the extent challenged by Defendants.

(b) Potential witnesses are all members of the Metropolitan Council and Police Chief Emmett Turner; the Plaintiffs, their employees and corporate representatives of the corporate entities and potential expert witnesses.

(c) The parties will endeavor to agree upon procedures regarding the authenticity of documents that will avoid unnecessary discovery or proof.

(d) Another case challenging the constitutionality of Metropolitan Ordinance No. 097-796, styled *Jerry C. Pendergrass, et al. vs. Metropolitan Government of Nashville and Davidson County*, Civil Action No. 3:97-1176 has been filed in this Court and was assigned to Judge Nixon, who, by order of December 5, 1997, has ordered that the two cases be consolidated and found that the Motion to Intervene in this cause by the Plaintiffs in Civil Action No. 3:97-1176 is now moot. Accordingly, the Plaintiffs in Civil Action No. 3:97-1176 shall be subject to this Case Management Order and Metropolitan Government of Nashville and Davidson County shall timely file its answer or other pleading in response to the Complaint in Civil Action No. 3:97-1176.

(e) Following appropriate discovery, it is anticipated that this case may well be one which would be suitable for determination by Motion for Summary Judgment.

(f) Any subsequent Case Management Conferences may be requested by any party.

(g) Other than discovery disputes, the parties are not willing to consent to proceed before the Magistrate Judge for any other part of the proceedings.

7. The jurisdiction of the Court is invoked under 28 U.S.C. § 1331, § 1343(3), 42 U.S.C. § 1983, 28 U.S.C. § 2201, 42 U.S.C. § 1988 and Rule 57 of the Federal Rules of Civil Procedure. The Court's jurisdiction is not disputed.

8. It is the theory of the Plaintiffs that Ordinance No. 97-097-796 is unconstitutional on its face, and as applied to Plaintiffs, all of whom are either adult oriented establishments as regulated in said Ordinance, or are associated with such adult oriented establishments as alleged in the Complaint, and that they are entitled to injunctive and declaratory relief respecting the enforcement of said Ordinance. It is the theory of the Defendants that the Ordinance is not unconstitutional, and that the constitutional rights of Plaintiffs are not adversely effected thereby.

9. (a) As yet, no issues in this case have been resolved. Those remaining to be resolved are the constitutionality of the Ordinance in question and the Plaintiff's entitlement to attorneys' fees.

(b) The parties, at this juncture, see no need to file counter-claims, cross-claims or third party claims to join additional parties or to have the matter certified as a class action.

~~10. Discovery shall be completed by May 4, 1998. Motions for Summary Judgment shall be filed by June 22, 1998 and replies to such Motions by July 13, 1998. Any Motions relating to the sufficiency of discovery or compliance with the Federal Rules permitting discovery shall be~~

~~filed between May 4, 1998 and June 22, 1998, but may be sooner filed as circumstances may require. Any motions to Amend Pleadings shall be filed by May 15, 1998. If necessary, the matter should be scheduled for trial in the latter part of 1998.~~ [JG]

/s/ Juliet Griffin
MAGISTRATE JUDGE
JULIET GRIFFIN

DATE: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.	)	No. 3-97-1066
	)	Consolidated with
	)	No. 3-97-1176
v.	)	
	)	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.	)	

ORDER

(Entered March 6, 1998)

The initial case management conference was held on December 1, 1997, after which the parties submitted a proposed case management order, which is contemporaneously entered, except that the deadlines set forth in ¶ 20 of such proposed order were modified during the case management conference held on March 3, 1998, and the following deadlines were established:

1. All written discovery shall be served by April 4, 1998, and responded to by May 4, 1998.

2. All depositions shall be completed by September 30, 1998.

3. All discovery motions shall be filed by October 15, 1998.

4. All motions to amend the pleadings shall be filed by October 15, 1998.

5. All dispositive motions shall be filed by November 16, 1998.

6. Responses to dispositive motions shall be filed by December 18, 1998.

No other filings in support of or in opposition to any dispositive motion shall be filed except with the express permission of the Honorable John T. Nixon, Chief Judge.

The defendants indicated that they may file a motion to dissolve the preliminary injunction (Docket Entry No. 23), because of the amendments to the ordinance in question. In that event, the plaintiffs advised that they anticipated filing not only a response but a motion for preliminary injunction on other grounds. The plaintiffs advised that they anticipated needing the responses to written discovery and approximately two depositions prior to filing such a response and motion.

There shall be no stay of discovery pending the resolution of any motion to dissolve the preliminary injunction. The plaintiffs shall have the right to seek additional time beyond the normal 10 working days to respond to any such motion and to file their own cross motion to enable them to take necessary discovery.

The plaintiffs advised that they may move to amend their pleadings in the near future, inter alia, to add new "headliner" plaintiffs. The plaintiffs shall confer with the defendants prior to filing any motion to amend to determine if there will be opposition to any such motion to amend and, if not, the parties shall submit an agreed order allowing any such amendment.

Within three (3) days after the defendants file a motion to dissolve the preliminary injunction and after

counsel have consulted with each other, counsel shall schedule a telephone conference call with the Court to address a briefing schedule for the response and cross motion, and any discovery necessary prior to filing such response and cross-motion.

It is so ORDERED.

/s/ Juliet Griffin
JULIET GRIFFIN
United States Magistrate
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.	)	No. 3-97-1066
v.	)	Consolidated with No. 3-97-1176
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.	)	

ORDER

(Entered September 16, 1998)

On August 19, 1998, counsel for the parties convened a telephone conference call with the Court, at which time the following matters were addressed:

1. The plaintiff's motion for modification of the previously entered discovery schedule (Docket Entry No. 30) is now MOOT, and the Clerk is directed to terminate that motion as pending.

2. Plaintiffs' counsel advised that discovery responses to the defendants' outstanding discovery were in the mail and the remainder of the responses would be sent to defendants' counsel the week of August 21, 1998.

3. Plaintiffs shall provide to defendants' counsel by facsimile a request for designation of Rule 30(b)(6) witness(es) by August 28, 1998.

4. The plaintiffs shall have until August 28, 1998 to move to extend their time to respond to the defendants' motion to dissolve (Docket Entry No. 39) the preliminary

injunction and to continue the September 21, 1998, hearing on the motion to dissolve.

5. The defendants shall have until September 18, 1998, to respond to the plaintiffs' request for Rule 30(b)(6) designation(s), including any objections, and to file a motion for a protective order. Such responses and motion shall be delivered to plaintiffs' counsel by facsimile.

6. The plaintiffs shall respond to any such motion for a protective order by September 28, 1998.

A telephone conference call with the undersigned is hereby scheduled for Thursday, October 1, 1998, at 2:00 p.m. to address any disputed issues regarding plaintiffs' request for discovery prior to responding to the pending motion to dissolve the preliminary injunction and/or the defendant's anticipated motion for a protective order. Although not specifically addressed on August 19, 1998, defendants' counsel shall initiate the conference call.

Although the defendants contend that the plaintiffs should not need any discovery to respond to the pending motion to dissolve the preliminary injunction or any discovery prior to the scheduled hearing, if any such discovery is permitted, a resolution of that issue will not occur until October 1, 1998, at the earliest (after consideration of the motion for a protective order to be filed by September 18, 1998, and the response to be filed by September 28, 1998), which will be after the hearing which is now scheduled for September 21, 1998.

It is so ORDERED.

/s/ Juliet Griffin
JULIET GRIFFIN
United States
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.	)	
v.	)	No. 3-97-1066
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.	)	Consolidated with No. 3-97-1176

ORDER

(Entered October 22, 1998)

In accordance with the memorandum contemporaneously entered, the defendants' motion for a protective order (Docket Entry No. 48) is GRANTED in all respects, except it is DENIED as to Request 32.

The defendants shall permit the plaintiffs to inspect documents responsive to this request. The defendants shall not, however, be required to compile or categorize any such documents. By so ruling, the Court assumes that the defendants maintain records of calls made to report criminal activity, incident reports, or other such documentation of complaints. If such documents are not maintained by type of business or by the time of such complaints, the defendants shall not be required to categorize such documents.

It is not clear to the Court the time period for which the plaintiffs seek the requested information. The plaintiffs shall advise the defendants of the relevant time

period, and when they intend to inspect such documents. If any dispute arises regarding such inspection, counsel shall arrange a telephone conference call with the undersigned to address such dispute.

Any party desiring to appeal this order may do so by filing a motion for review no later than ten (10) days from the date of service of this order. The motion for review must be accompanied by a brief or other pertinent documents to apprise the District Judge of the basis for the appeal. *See* Rule 303(f) of the Local Rules for Magistrate Proceedings.

It is so ORDERED.

/s/ Juliet Griffin
JULIET GRIFFIN
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al	)	
v.	)	
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.	)	No. 3-97-1066
and	)	Consolidated with
JERRY C. PENDERGRASS, et al.,	)	No. 3-97-1176
v.	)	
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.	)	

MEMORANDUM

(Entered October 22, 1998)

The underlying dispute in this matter pertains to the constitutionality of the recently amended ordinance designed to license and regulate adult entertainment and adult businesses, Chapter 6.54 of the Metropolitan Code of Laws, and the extent of discovery which should be allowed at this stage of the proceedings. Plaintiffs' motion for preliminary injunction based upon the lack of prompt judicial review was granted by order entered December 8, 1997 (Docket Entry No. 23). The defendants subsequently filed a motion to dissolve the preliminary injunction which is currently pending before the Court (Docket Entry No. 34). Prior to

filing a response to the defendants' motion or filing a second motion for preliminary injunction, the plaintiffs served upon defendants, pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, a notice of deposition outlining 39 topics about which they seek documents and testimony (Docket. Entry No. 42). The defendants have filed the instant Motion for a Protective Order (Docket Entry No. 48) asking the Court to limit the plaintiffs' requests for discovery.

The ordinance at issue explicitly states in its preamble that its provisions have "neither the purpose nor effect of imposing limitations or restrictions on the content of any communicative materials, including sexually oriented materials or entertainment," but rather that its regulation of "adult entertainment establishments" is designed to "promote the health, morals, and general welfare of the citizens." *See* Preamble, Ch. 6.54 of Metropolitan Code (Docket Entry No. 49, Def. Response to Request No. 34). The cited evidence relied upon by the Metropolitan Council to make its specific findings of adverse secondary effects which the ordinance seeks to regulate includes studies, judicial opinions, newspaper articles, and reports from the Police Department and the Department of Health of the Metropolitan Government of Nashville and Davidson County outlining a variety of "unlawful and unhealthy activities which occur within adult establishments." *See* Findings, Ch. 6.54 of Metropolitan Code.

In *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 96 S.Ct. 2440. 49 L.Ed.2d 310 (1976), the constitutionality of zoning ordinances differentiating between "adult" movie theaters which exhibited sexually explicit "adult" movies and other theaters was considered by the Court. Summary judgment in favor of the defendants by the District Court

was reversed by the Court of Appeals for the Sixth Circuit which, reasoning that the ordinance imposed a prior restraint on constitutionally protected communication, held the ordinance invalid under the Equal Protection Clause. *American Mini Theaters, Inc. v. Gibbs*, 518 F.2d 1014 (6th Cir. 1975). The Supreme Court reversed, holding that zoning ordinances designed to combat the undesirable secondary effects of businesses which purvey sexually explicit materials are to be reviewed under the standards applicable to "content neutral" time, place, and manner regulations. Writing for the plurality, Justice Stevens observed that, because the zoning ordinances sought to avoid the secondary effects and not the dissemination of "'offensive' speech,'" a city was entitled to distinguish between adult theaters and other kinds of theaters "without violating the government's paramount obligation of neutrality in its regulation of protected communication." 427 U.S. at 70-71.[1]

In *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.29 (1985), the Court again considered the constitutionality of a zoning ordinance which regulated adult motion picture theaters. In that case, to prevent crime, protect retail trade, maintain property values and generally protect and preserve the quality of the city's neighborhoods, commercial districts and quality of urban life, a Seattle suburb enacted an

[1] Justice Powell, in concurrence, elaborated: "[the] dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings." 427 U.S. at 82 n.6.

ordinance prohibiting adult movies theaters within 1000 feet of any residential zone, church, park, or school. The plaintiffs sought a declaratory judgment that the ordinance was in violation of the First and Fourteenth Amendments and a permanent injunction against its enforcement. The District Court entered a preliminary injunction against enforcement of the ordinance. Shortly thereafter, the parties agreed to submit the case for a final decision on whether a permanent injunction should issue on the basis of the record already developed. The District Court determined that the city was not required to show specific adverse impact from the operation of adult theaters but could rely upon the experiences of other cities and held that the ordinance did not substantially restrict First Amendment interests.

The Court of Appeals for the Ninth Circuit concluded that the ordinance substantially restricted First Amendment interests and reversed, finding "Renton's justifications conclusory and speculative" because the city "has not studied the effects of adult theaters and applied any such findings to the particular problems or needs of Renton." *Playtime Theaters, Inc. v. City of Renton,* 748 F.2d 527, 537 (9th Cir. 1984). The Supreme Court, however, found that the ordinance was "completely consistent with our definition of 'content-neutral' speech regulations as those that are justified without reference to the content of the regulated speech." 475 U.S. at 48 (citations omitted). Noting that the Ninth Circuit had "imposed on the city an unnecessarily rigid burden of proof," the Court held that Renton was "entitled to rely on the experiences of Seattle and other cities, and in particular on the 'detailed findings' summarized in [*Northend Cinema, Inc. v. Seattle*, 90 Wash. 2d 709, 585 P.2d 1153 (1978)], in enacting its adult

theater zoning ordinance." 475 U.S. at 51. The Court stated further "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as the evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." 475 U.S. at 51-52.

In a decision composed of four opinions, the Court upheld a public indecency statute requiring nude dancers to wear pasties and g-strings in *Barnes v. Glen Theatre Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Chief Justice Rehnquist, writing for the plurality, applied the four-part test developed in *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968) ("a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest"), and found that the statute furthered a substantial government interest in protecting order and morality, and that the statute was sufficiently "narrowly tailored" to survive constitutional scrutiny. 501 U.S. at 572. Justice Scalia concurred in upholding the statute, but rejected the contention that nude dancing is entitled to First Amendment protection. In his concurring opinion, Justice Souter, basing his application of *O'Brien* on assumptions previously relied upon in *Renton,* agreed that nude dancing is entitled to First Amendment protection but disagreed as to the interest justifying restriction of First Amendment rights. Justice Souter stated:

> In light of *Renton's* recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment of the type offered at the Kitty Kat Lounge and the Glen Theatre's 'bookstore' furthers its interest in preventing prostitution, sexual assault, and associated crimes. . . . I do not believe that the state is required affirmatively to undertake to litigate this issue repeatedly in every case.

501 U.S. at 584.

The Sixth Circuit followed the line of reasoning enunciated by Justice Souter in two cases, *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997) (considering constitutionality of ordinance regulating adult-oriented businesses), and *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994) (considering city public indecency ordinance). Based on Justice Souter's opinion, the Sixth Circuit stated that "requiring affirmative evidence of a secondary effects motivation . . . imposes a burden on the city that Justice Souter's opinion seems designed to avoid." *Triplett Grille*, 40 F.3d at 135. Notably, the Court applied this language in a case considering the constitutionality of a Chattanooga ordinance which, like the one at issue in this case, regulates adult-orien businesses. The Court adopted Justice Souter's reasoning:

> Our appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional. . . . [L]egislation seeking to combat

> the secondary effects of adult entertainment need not await localized proof of those effects.

DLS, 107 F.3d at 411 (citing *Barnes*, 501 U.S. at 582-84). The Court went on to explicitly overrule prior Sixth Circuit authority which held that the government must show that the legislature actually relied on evidence of secondary effects. 107 F.3d at 411.

Considering the plaintiffs' discovery requests in light of prospective relevant issues and the current procedural status of the case, the Court grants the defendants' motion for a protective order in significant part and makes the following specific rulings.

Requests 1-4, 20, 34, and 37

Requests 1 and 2 pertain to "the initial proposal of and subsequent drafting, revisions, adoption, and enactment" of the ordinance. Requests 3 and 4 seek "any and all documents submitted to the Metropolitan Government of Nashville and Davidson County regarding, concerning, related to, or in furtherance of the initial proposal of an subsequent drafting, revisions, adoption and enactment" of the ordinance. Request 20 pertains to the creation and appointment of persons to the "Sexually Oriented Business Licensing Board." Request 34 pertains to the identities of each and every "sexually oriented business/ establishment" located within Davidson County. Request 37 pertains to the method by which the licenses and permit fees and the applicable renewal fees were determined.

By Defendants' Reply to Plaintiffs' Response to Motion for a Protective Order (Docket Entry No. 53) the defendants

have advised that they will make available a deponent to testify regarding these items.

Requests 5-17[2], 24-29, and 33

Requests 5 and 6 seek any and all documents relied upon "regarding, concerning, related to or in furtherance of the initial proposal of and subsequent drafting, revisions, adoption, and enactment" of the ordinance. Requests 7 and 8 pertain to "each and every governmental interest meant to be furthered" by the ordinance. Requests 9 and 10 pertain to the "purpose and intent behind" the ordinance. Requests 11 and 12 pertain to "the manner by which the provisions of [the ordinance] further the governmental interests described in requests 7 and 8." Requests 14-17 pertain to the "manner or method by which documents as referenced in requests [3-6] above establish that [the provisions of the ordinance] will in fact further the governmental interests as referenced in [requests 7 and 8] above." Requests 24 seeks a deponent to testify about how the evidence, materials, studies, judicial opinions, reports and articles referenced in the "findings" section of the ordinance relate to the additional findings in the ordinance, the necessity of the ordinance provisions, and how the provisions of ordinance "further any of the governmental interests referenced to in requests 7 and 8 above." Request 25 seeks a deponent to testify as to the basis for each of the preambles and findings in the ordinance. Request 26 seeks a deponent to testify regarding "any and all documents and information utilized, relied upon, or referenced in preparing the preambles and

[2] There is no Request 13 in the plaintiffs' list of requests.

findings in the ordinance." Requests 27 and 28 seek a deponent to testify as to "why the findings support the enactment of each and every provision of the ordinance." Requests 29 seeks a deponent to testify as to "[a]ny further preambles or additional findings (not limited as to the definition of this word as set forth above) associated with any purpose for the enforcement or interpretation" of the ordinance. Request 33 seeks a deponent to testify as to information regarding enactment and enforcement of any similar law which establishes the same type of provisions to further the same government interests as the ordinance.

The defendants state that the documents "relied upon" by the Metropolitan Council have been provided to the defendants. They argue, however, that providing a witness to be deposed on the topics outlined in Requests 5-17, and 24-29 is superfluous and irrelevant because those issues are legal determinations to be made by the Court and no purpose is served for a government employee to testify as to his or her opinion on the issue. The defendants assert that Request 33 pertaining to similar laws seeks purely a legal conclusion which a Rule 30(b)(6) deponent would be unqualified to give, is irrelevant to the issues in this litigation, calls for information protected from disclosure by legislative privilege, and is too vague to answer.

The plaintiffs assert that it is the defendants' burden to establish the causal connection between the asserted governmental interest and the ordinance and the Court's duty to ascertain whether the stated purpose of the legislation and asserted justification is the "real" reason for enacting such a law. Based on this interpretation of the law, the plaintiffs argue that the evidence sought from a

designated Rule 30(b)(6) deponent is relevant and discoverable.

The plaintiffs' argument is not persuasive in light of the very clear language to the contrary in *Barnes, DLS, Inc.*, and *Triplett Grille*. Moreover, it is undisputed that the doctrine of legislative immunity is applicable to the motives of city council members in enacting the legislation underlying the current dispute, *see Schiltz v. Commonwealth of Virginia*, 63 F.3d 295, 303 (4th Cir. 1995); *Haskell v. Washington Township*, 864 F.2d 1266 (6th Cir. 1988), and, unless the privilege is explicitly waived, city council members cannot be required to testify regarding their conduct in their legislative capacity. *See Dombrowski v. Eastland*, 387 U.S. 82, 85, 87 S.Ct. 1425, 1427, 18 L.Ed.2d 577 (1967); *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 299 (D. Md.1992). Although this testimonial immunity has been extended to preclude discovery of the personal notes and files of city council members, *Simpson v. City of Hampton, Va.*, 166 F.R.D. 16, 18 (E.D.Va. 1996), "documents created by legislative activity can, if not protected by any other privilege, be disclosed and used in a legal dispute that does not directly involve those who wrote the document, i.e., the legislator or his aides." *Corporacion Insular de Seguros v. Garcia*, 709 F.Supp. 288, 297 (D.P.R. 1989). Thus, a defendant will be required to produce at the request of a plaintiff, any documents that were prepared by a committee during the course of its deliberations. *Marylanders for Fair Representation, Inc v. Schaefer*, 144 F.R.D. at 302 n.20 (D. Md. 1992). The defendants have provided the documents relied upon by the Metropolitan council. The plaintiffs are not entitled to the testimony requested. Accordingly, the

defendants motion for a protective order is granted with respect to Requests 5-17, 24-29, and 33.

Requests 18 and 19

Requests 18 and 19 ask for a deponent to testify regarding definitions and interpretations of ordinance provisions which are undefined. The Court agrees with the defendants as that, if the plaintiffs cannot determine the meaning of terms within the ordinance, they may challenge them on legal grounds and the Court may make a decision on the legal issue of whether such "undefined terms" render the ordinance unconstitutional. Accordingly, no discovery is necessary on this issue and the defendants' motion for a protective order is granted as to Requests 18 and 19.

Requests 21-23 and 35

Request 21 asks for a deponent to testify regarding the purposes and reason underlying any rules, policies, or procedures adopted by the Sexually Oriented Business Licensing Board. Request 22 asks for a deponent to testify regarding the provisions of, definitions applicable to, and interpretation of any an all rules, policies or procedures considered or enacted by the Sexually Oriented Business Licensing Board. Request 23 seeks a deponent to testify as to "[w]hat, if any" effect zoning provisions in the Metropolitan Code related to sexually oriented business/establishments have had "on any perceived adverse secondary effects engendered by such businesses." Request 35 seeks a deponent to testify to the public disclosure policies and requirements regarding information supplied by license

and permit applicants and their agents and representatives pursuant to the provisions of the ordinance.

The relevancy of such testimony to the constitutionality of the ordinance is questionable and, in any case, such a request is premature as this stage of the proceedings. Accordingly, the defendants' motion for a protective order is granted with regard to Requests 21-23 and 35.

Requests 30 and 31

Requests 30 and 31 seeks a deponent to testify as to "[a]ny and all documents prepared for the enforcement or interpretation of the ordinance." The defendants, interpreting this as a request for the license and application forms, state that the plaintiffs have been provided with copies of the prospective forms.

If the requested information is reasonably related to the stated purpose of the ordinance, the use of the application forms is constitutional. The Court finds the relevance of testimony concerning the creation of the forms tangential to the constitutionality of the ordinance and certainly premature at this stage of the proceedings. Accordingly, the defendants' motion for a protective order is granted as to requests 30 and 31.

Request 32

Request 32 seeks "[c]riminal statistics and other records or information evidencing incidents of all criminal activity at or in the areas near businesses in Davidson County which are open and attract customers either on a 24 hour basis or during the hours between 2:00 a.m. and

6:00 a.m. on weekdays and between the hours of 3:00 a.m. and 12:00 noon Sundays."

In response, the defendants assert that no criminal statistics, other records, or information responsive to this request exists. The Court questions this broad assertion, however. Although such information may not exist in a compiled form, it can be assumed that the defendants have access to raw data pertaining to criminal activity in Davidson County.

The Court assumes that such information is requested to refute the findings based on evidence from other jurisdictions as to the proliferation of crime engendered in the vicinity of sexually-oriented businesses and establishments. Although the Court held in *Renton* that a city was not required to produce its own studies as to the secondary effects and could rely on evidence produced in other cities, it did not address the issue of whether the plaintiff is entitled to rebut the defendants' non-localized evidence. The cases addressing this issue were decided on the evidence before the Court on summary judgment, which apparently did not include localized evidence contrary to the evidence relied upon in other locales. Although it is not the province of the undersigned to determine whether the plaintiffs will be entitled to put on proof to rebut the non-localized evidence, the issue will never be reached if the plaintiff is foreclosed at this stage in the proceedings from gathering the raw data upon which to make such an argument. Accordingly, the plaintiff should be afforded the opportunity to inspect this raw data, which might rebut the evidence relied on from other locales.. Accordingly, the plaintiff should be given access to the relevant criminal report data. The defendant's motion for a protective order is denied with respect to Request 32.

Request 33

Request 33 seeks information regarding the enactment and enforcement of similar laws which establish the type of provision found within the ordinance "thereto to further the government interests discussed in requests 7 and 8 above." The defendants assert that this request seeks a purely legal conclusion which a Rule 30(b)(6) deponent would be unqualified to give, is irrelevant to the issues in this legislation and calls for information regarding legislators motives which is protected from disclosure by legislative privilege, and is too vague to answer because what constitutes a "similar" law is open to interpretation. To the extent that Request 33 (which the Court finds vague and amorphous) can be deciphered, the Court agrees with the defendants that it seeks information regarding legislators' motives and, as previously discussed, this information is barred from discovery. Accordingly, the defendants' motion for a protective order is granted as to Request 33.

Requests 36

Request 36 seeks a deponent to testify as to other businesses operating in Davidson County and other individuals required to disclose and provide the information required by the ordinance in order to obtain a license or permit. The defendants assert that, as no other business or individuals are required to make the identical disclosure, there are no responsive documents available. Defendants' motion for a protective order is granted as to Request 36.

Request 38

Request 38 seeks a deponent to testify requiring closing hour requirements for business licensed by the Metropolitan Government of Nashville and Davidson County. Plaintiffs can consult the Metropolitan Code of Law to find this information. Defendants' motion for a protective order is granted as to Request 38.

Request 39

Plaintiffs seek a deponent to testify to any and all documents in their Request for Production of Documents. The defendants assert that the documents speak for themselves and that they should not be put to the burden of producing deponents to testify generally regarding these documents which were obtained from a variety of sources. To the extent that this broad request can be distinguished from the Requests 1-38 and the separate rulings made in conjunction with each of those requests, the Court agrees with the defendants that, at this stage in the proceedings, the defendants should not be required to produce a Rule 30(b)(6) deponent to testify to the documents produced as a result of the plaintiffs Request for Production of Documents. Accordingly, the defendants' motion for a protective order is granted as to Request 39.

An appropriate order will enter.

/s/ Juliet Griffin
JULIET GRIFFIN
United States Magistrate
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION*

DEJA VU OF NASHVILLE, INC., et al.	)	No. 3-97-1066
	)	Consolidated with
v.	)	No. 3-97-1176
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.	)	

ORDER

On October 28, 1998, a hearing was held upon the parties' request, at which time the following matters were addressed:

1. The deadline for the plaintiffs to respond to the defendants' pending motion (Docket Entry No. 34) to dissolve the preliminary injunction is extended to November 2, 1998. Such response shall be transmitted by personal delivery or facsimile to defendants' counsel by 11:00 a.m., C.S.T. (Nashville time).

2. Any reply to such response shall be filed by the defendants, if necessary, by November 4, 1998, and a copy transmitted by facsimile to plaintiffs' counsel.

3. The defendants announced that they agreed to extend the grace periods for the business plaintiffs and the individual plaintiffs to 120 days and 45 days, respectively,

* Any typographical and/or incorrect punctuation found in the following pages were intentionally left to show accurately how the original documents appeared.

from the date of entry of any order granting the defendants' pending motion to dissolve the preliminary injunction for such plaintiffs to make application for a license under the amended ordinance, and that none of the ordinance provisions will be effective against the plaintiffs nor will any action be taken against the plaintiffs for their non-compliance with the ordinance during the grace period as set forth above.

4. After the entry of any order granting the defendants' pending motion to dissolve the preliminary injunction, the plaintiffs shall have 10 working days to file a supplemental motion for preliminary injunction, in which all issues upon which the plaintiffs relies in this case shall be raised.[1] Although the parties and the Court had originally, by prior scheduling orders, contemplated that the plaintiffs' second motion(s) for preliminary injunction would be heard at the same time as the defendants' motion to dissolve the injunction, after further consideration, it appears that it would be more efficient to delay consideration of any second motion for preliminary injunction until after the resolution of the defendants' pending motion to dissolve the preliminary injunction.[2]

5. The deadline for filing all dispositive motions (except motions for injunctive relief) shall be extended, and an extended deadline determined after the resolution of the defendants' motion to dissolve the preliminary injunction, if denied, or after the plaintiffs' anticipated

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[1] In other words, the plaintiffs shall not piecemeal motions for preliminary injunction but shall raise all grounds in support of a motion for preliminary injunction at one time.

[2] Specifically, if the Court were to deny the motion to dissolve, there would be no need for a second motion for preliminary injunction.

second motion for preliminary injunction, if the motion to dissolve is granted.

6. As a result of the agreement reached among the parties, the plaintiffs' motion to continue (Docket Entry No. 57) the hearing scheduled for November 5, 1998, was WITHDRAWN, and the Clerk is directed to terminate that motion.

7. As a result of the scheduling matters addressed above, the defendants WITHDREW their motion to grant the defendants' motion to dissolve based on the plaintiffs' failure to file a response or to clarify the scope (Docket Entry No. 59), and the Clerk is directed to terminate that motion as pending.

8. Plaintiffs' counsel shall call the office of the undersigned within five (5) days of the resolution of the pending motion to dissolve the injunction[3] and, if the motion is granted, within five (5) days of the resolution of the plaintiffs' anticipated second motion for preliminary injunction.

It is so ORDERED.

/s/ Juliet Griffin
JULIET GRIFFIN
United States Magistrate Judge

[3] If the motion is denied, further proceedings will be scheduled, and deadlines established for filing dispositive motions. If the motion is granted, specific deadlines for the plaintiffs to file a supplemental motion for preliminary injunction and for briefing on such motion will be established.

THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.	
v.	No. 3:97-1066 Judge Nixon Magistrate Judge Griffin
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	
and	Consolidated Cases
JERRY C. PENDERGRASS, et al.,	No. 3:97-1176 Judge Nixon Magistrate Judge Griffin
v.	
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.	

MEMORANDUM

(Entered December 3, 1998)

Pending before the Court is Defendant's Motion to Dissolve Preliminary Injunction, (Doc. No. 34), to which Plaintiffs have filed a Response, (Doc. No. 63)[1] Defendant, in turn, has filed a Reply to Plaintiffs' Response. (Doc. No. 67.) For the reasons set forth below, Defendant's motion is GRANTED and the preliminary injunction imposed in this case is hereby dissolved.

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[1] Plaintiffs have filed both a Response (Doc. No. 63) and a Memorandum in support of their Response (Doc. No. 64). For the sake of brevity, the Court's citations to Plaintiffs' Response shall in actuality refer to Plaintiffs' Memorandum. (Doc. No. 64.)

I. Background

This case revolves around Defendant Metropolitan Government of Nashville and Davidson County's (hereinafter Metro) Sexually Oriented Business Ordinance ("the Ordinance"). By Order dated December 8, 1997, this Court granted Plaintiffs' motion for a preliminary injunction based on the findings that the Ordinance as written did not sufficiently preserve the status quo, nor did it provide for sufficiently prompt judicial review. (Doc. No. 23.) Defendant has moved for the preliminary injunction to be dissolved now that the Ordinance has been amended, as has the State's writ of *certiorari* statute. (Def.'s Mem. at 2-3.) The Court held a hearing on November 5, 1998, during which time the parties had an opportunity to present evidence and argue their positions.

A. The Enjoined Ordinance

The Plaintiffs are a group of establishments and individuals which provide adult public entertainment in the form of live nude and/or semi-nude performance dance entertainment in a club environment. This Court enjoined a regulatory scheme enacted by the Metro Council which requires "sexually oriented businesses" to obtain licences before being permitted to operate and adult entertainers employed in these establishments to obtain permits in order to perform.[2]

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[2] Again for the sake of brevity, the Court hereinafter will refer only to licenses sought by businesses since the issues at hand apply equally to license seekers as well as permit seekers.

The Ordinance as originally written specifically requires the operators of all "sexually oriented businesses," including bookstores, video stores, theaters, and nightclubs which "regularly present[ ] material or exhibitions distinguished or characterized by an emphasis on matter depicting . . . 'specified sexual activities' or 'specified anatomical areas'" to obtain licenses to operate issued by a specially established board ("the Board"). Tenn. Code Ann. §6.54.010(S). The application for a license requires the operators to provide such information as addresses, employment history, criminal violations of a sexual nature or involving moral turpitude, fingerprints, citations of zoning code violations, and diagrams of booths, stalls, and cubicles. §§ 6.54.040(A)(5)-(6), 654.070A)(2). Operators who have been convicted or pleaded *nolo contendere* to a crime of a sexual nature or involving moral turpitude are prohibited from obtaining licenses for specified periods of time. §§ 6.54.040(C)(2)(a)-(b), 6.54.070(A)(9). Similar requirements apply for entertainers employed in these businesses. Licenses must be renewed on a yearly basis, and can be revoked for a variety of reasons, including discovery that an operator employs an entertainer who does not have a permit, or the furnishing of sexually explicit material to minors. §§ 6.54.100, 654.140.

Once the application is received, the Board must distribute a copy of the application "promptly" to the Police Department, the Department of Codes and Administration, the Health Department, the Fire Department, and the applicant. § 6.54.040(A)(1). These departments are required to conduct inspections and to provide reports to the Board within thirty days of receipt of the application. § 6.54.040(B)(3). The Board is then required to make its determination within twenty days of receiving these

reports. § 6.54.040(C)(1). However, in certain circumstances, the Board may hold the application for an additional thirty days before issuing its initial decision. § 6.54.040(C)(7).

The enjoined Ordinance makes provisions for the appeal of unfavorable decisions. In the case of both operators and entertainers, if the license is denied, the applicant has the right to request a hearing within ten days of notification of the decision. §§ 6.54.040(E)(1), 6.54.070(D)(6). Once the request is received, the Board is required to schedule a hearing at its next meeting, during which time it hears evidence presented by the applicant and issues its final decision.[3] The denial of a license is required to be mailed within ten days to the applicant's address. §§ 6.54.040(E)(1)(e), 6.54.070(D)(6)(e). An appeal of this decision may be made directly to the Chancery Court. §§ 6.54.040(E)(2), 6.54.070(D)(7). The metropolitan government department of law may institute proceedings for a declaratory judgment. In addition, the Ordinance permits an applicant to appeal by filing a petition for writ of certiorari, in which case the Board must submit all records of the proceedings before it to the court within ten days. *Id.* The enjoined Ordinance makes similar provisions for the appeal of the denial of an entertainer's permit. However, in the case of entertainers, the board has only fifteen days to make its initial determination after receiving the reports from other agencies, although it may hold the application for an additional thirty days under specified circumstances. §§ 6.54.070(C)(1), (C)(5).

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[3] The Board is required to meet twice a month. § 6.54.020(D)(1). Board Policy No. 10 dictates that the Board meet on the second and fourth Tuesdays of every month.

B. The Amended Ordinance

1. Maintenance of the Status Quo

The amended Ordinance allows currently operating businesses to appeal adverse administrative decisions within 60 days, during which time the adverse decision is stayed. Furthermore, once the appeals process is initiated, the adverse decision is further stayed until the court upholds the decision after adjudication on the merits. § 6.54.040(E)(3). If the business or entertainer forgoes appeal, they may continue to operate until the 60 day period has expired. *Id.* An identical provision applies to individual permit applications. § 6.54.070(D)(3).

2. Prompt Review

a. *Administrative Determinations*

The administrative process, as amended, will be completed in 47 days. (Def.'s Mem. at 4). Upon submission of an application for a license, the Department of Codes Administration, the Fire Department, and the Health Department will inspect the business, and the Police Department will run a criminal background check on the applicant. § 6.54.040(B)(1). All of these departments must submit reports to the Board within 20 days of the filing of the application. *Id.* Failure to investigate or submit a timely report by any department will be construed as though the department approved the application. *Id.*

Once the Board has the reports, it must meet and deny or grant the application within 15 days. § 6.54.040(C)(1). Failure to meet or meeting without a quorum shall be treated as an approval of the application and the license will be mailed to the applicant. *Id.* If the Board meets on

the 15th day and allowing one day to mail the result, the entire process will be complete in 47 days.[4] (Def. 's Mem. at 4.)

Upon denial of an application, the applicant can appeal to the Board for a full hearing or proceed to court. § 6.54.040(E)(1)-(2). The applicant has 5 days to appeal to the Board and the Board has 15 days to meet and hear the appeal. §6.54.040(E)(1)(a)-(b). An oral decision will be rendered at the hearing. § 6.54.040(E)(1)(d) Allowing one day to mail a written decision, the applicant may add an additional 21 days to the administrative process at his or her discretion.

b. *Judicial Review*

Applicants can apply for a writ of *certiorari* in order to have the final decision of the Board reviewed since a procedure for review is not otherwise provided. Tennessee Code Annotated § 27-9-111, addresses the briefing and hearing schedule used in processing writs. The section has been amended as follows:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the United States Constitution, and either the petitioner or the respondent requests an expedited hearing, *the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari*. When an expedited hearing

[4] Including a potential ten day extension for additional investigation into out-of-state records, if necessary. § 6.54.040(C)(8).

> is requested, the board or commission shall forward the transcript described in Tennessee Code Annotated, Section 27-9-109 within seven days of the grant of the writ of ***certiorari***.

(Emphasis added.) The statute thus now requires a decision within a mandated period of time for all First Amendment cases.

II. Discussion

In order to determine the propriety of injunctive relief, the Court must look to the following factors: (1) the likelihood of the movant's success on the merits; (2) the irreparable harm that could result if the injunction is not issued; (3) the impact on the public interest of granting or denying the injunction; and (4) the possibility of substantial harm to others if the injunction is issued. *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994). Sixth Circuit precedent makes it clear that these four factors are not absolute prerequisites, but must rather be balanced by the Court. *Performance Unlimited v. Questar Pubs., Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1993) (citing In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985)). If a party demonstrates substantial likelihood of success on the merits, the three other factors will favor the party as well, *Planned Parenthood Ass'n v. McWherter,* 716 F. Supp. 1064, 1066 (M.D. Tenn. 1980); *cf. Performance Unlimited,* 52 F.3d at 1385-86 (quoting Merrill Lynch, Pierce, Fenner & Smith, 836 F. Supp. 428, 432 (W.D. Mich. 1993) (citation omitted)). The Court will therefore focus its inquiry upon the first factor, although it will also discuss the others in turn.

A. *Likelihood of Success on the Merits*

This Court enjoined the original Ordinance on two grounds: 1) the Ordinance failed to sufficiently maintain the status quo pending judicial review; and 2) the Ordinance did not provide for prompt judicial review. (Court's Mem. at 10-15.) Both of the grounds fell under the Court's analysis of the Plaintiffs' likelihood of success on the merits. *Id.*

Although facial challenges to a licensing scheme are disfavored, they are permitted in the First Amendment context when the licensing scheme is challenged as permitting undue delay, "such that 'every application of the statute create[s] an impermissible risk of suppression of ideas,'" as is the case here. *FW/PBS. Inc. v. City of Dallas*, 493 U.S. 215, 223-24 (1990) (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798, n. 15 (1984)). Licensing schemes such as the one at issue are subject to prior restraint First Amendment constitutional analysis. While there is a "heavy presumption against [their] constitutionality," *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 562 (1975)), such a system will be upheld if it incorporates certain procedural safeguards. *Freedman v. Maryland,* 38 U.S. 51, 58 85 S.Ct. 734 (1965). Specifically, the decision-maker must not be given unlimited discretion so as to risk suppression of protected speech. *FW/PBS,* 493 U.S. at 225026. An ordinance which does not restrict the time in which a decision must be made is a form of such unbridled discretion. *East Brooks Books v. City of Memphis,* 48 F.3d 220, 224 (6th Cir. 1995). Accordingly, a statute must impose restraints in advance of a final judicial determination for only a brief

period of time, preserve the status quo during that time, and afford expeditious judicial review. *Id.* at 224.

1. Status Quo

Plaintiffs did not respond to Defendant's assertion that the amended Ordinance now provides for preservation of the status quo pending judicial review, (*See* Pls.' Mem.), as Defendant noted during oral argument. Upon review of the record and in light of Plaintiffs' failure to respond to this issue, the Court finds that the amended Ordinance does, in fact, provide for the maintenance of the status quo pending judicial review such that Plaintiffs are no longer likely to succeed on the merits of this particular issue.

2. Prompt Judicial Review

The Defendant argues that the amended Ordinance, together with the amended State stature regarding writs of certiorari, provide for prompt judicial review. The administrative determination will be complete within 47 days and the appeal process following adverse administrative decisions will be complete within 40 days. (Def.'s Mem. at 9.) The 47-day process is mandated by the timetable built into the Ordinance. The amended writ statute answers this Court's concern regarding the issuance of an opinion within a mandated period of time by requiring that all First Amendment cases be heard and decided within 40 days. (Def.'s Mem. at 7).

Defendant next points out that the 40-day period within which writ decisions regarding the First Amendment must be made is less than the impermissible 5 month delay cited in *East Brooks Books v. City of Memphis,* 48 F.3d 220

(6th Cir. 1995) (rehearing and suggestion for rehearing en banc denied May 5, 1995). Furthermore, though the case law does not indicate what specific time period would satisfy the "prompt judicial review" standard, *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 373-74 (1971), determined that 60 days for the completion of judicial proceedings was sufficient to meet the standard. Thus, the period for completion of judicial review under the amended Ordinance sufficiently cures the enjoined Ordinance's flaw in not providing any meaningful period of time within which an opinion must issue, as well as meets the legal standard for "prompt judicial review."

The Defendant further notes that the Court cited approvingly to a case in its Memorandum granting the preliminary injunction in which a 90-day waiting period from the beginning to the end of the judicial proceedings was found reasonable. *Wolff v. City of Monticello,* 803 F. Supp. 1568, 1574 (D. Minn. 1992). The waiting period under the ordinance as amended is only 87 days – 47 for the initial determination and 40 for the judicial review. Finally, in the event that the court fails to rule within 40 days of the filing of the appeal, the license shall issue. Metropolitan Code § 6.54.150(A)(10).

Plaintiffs counter with three arguments. First, Plaintiffs contend that in the Sixth Circuit, "prompt judicial review" requires a prompt judicial *determination,* not merely access to review. (Pls.' Mem. at 3-4 citing *East Brooks Books, supra*) Second, the Ordinance still does not mandate a time by which a writ petition must be granted or denied. (Pls.' Mem. at 5.) Since courts determine their own dockets and the only remedy for tardiness is popular vote, the Ordinance cannot guarantee that a decision will be handed down by the court hearing the writ petition

within a sufficiently "prompt" period of time. *Id.* Plaintiffs also contend that courts will not be bound by the 40-day period in which they are to hand down decisions since a similar statute requiring Judges in non-jury cases to render an opinion within 60 days was held to be directory, not mandatory. (*Id.* at 5-6, citing *Schaeffer v. Richard,* 43 Tenn. App. 205, 306 S.W.2d 340 (1956, *cert.* den. Tenn. Sup. Ct. 1957.) Finally, Plaintiffs argue that the granting of a writ petition is discretionary and provides for an extremely narrow scope of review even when granted. (*Id.* at 6-13.) Common law writs only allow a determination of whether the Board acted illegally, fraudulently, or beyond its jurisdiction. (*Id.* at 8.) Thus, Plaintiffs contend, the intrinsic correctness of the Board's decision can not be reviewed pursuant to a common law writ. (*Id.* at 6.)

The Court notes initially that Plaintiffs are correct in their assertion that the Sixth Circuit requires a prompt judicial determination in order to meet the "prompt judicial review" standard. J. David Guerrera, Note, *Constitutional Law: The Meaning of Prompt Judicial Review Under the Prior Restraint Doctrine After FW/PBS v. City of Dallas,* 62 Brook. L. Rev., 1217, 1241-42. However, the Court disagrees with Plaintiffs that the State writ of *certiorari* statute as amended does not mandate a determination within a sufficiently prompt period of time. The statute clearly states that a decision must be handed down within 40 days of the court granting the writ of *certiorari.* Tenn. Code Ann. § 27-9-111. The Defendant has filed an affidavit from the Clerk and Master for the Chancery Courts of Davidson County in which she swears that "[g]enerally, our office processes all petitions for a writ of *certiorari* including presenting the proposed order and petition to a chancellor, docketing the signed order and

issuing the writ of *certiorari* within two days of the filing of the petition." (Def.'s Exhibit D to Mot. at 2.) Thus, Plaintiffs' concern that the courts will not promptly determine whether or not to grant the writ petition is unfounded.

Plaintiff's second contention, that the courts will not be bound by the 40-day period, relies on reasoning from *Schaeffer v. Richard, supra.* The *Schaeffer* decision is distinguishable, however, since in that case, the legislature did not declare void decisions that were not rendered within the mandated 60-day period. *Id.* at 212. Thus, in that case there was no recourse if a decision was rendered outside of the "mandated" period. In the instant case, if a decision is not rendered within the 40-day period, then the license shall issue, thus a safeguard is in place against judicial tardiness. The legislature need not declare the tardy decision void, since the license shall issue and remain in effect until and unless the decision finally rendered revokes it. Therefore, this argument by the Plaintiffs also lacks merit.

As for Plaintiffs' contention that the granting of the writ is discretionary and that it is too narrow in scope to provide adequate judicial review, this Court notes that Plaintiffs admitted during oral argument that Defendant has done all that it can do within its power as Metro to make judicial review of Board determinations prompt. The Court is not convinced by Plaintiffs' argument that the amended statutory language of the State writ statute does not require that all First Amendment cases be heard, thereby causing a fatal flaw in the statute. Plaintiffs themselves argue that without a review under a writ of *certiorari*, applicants will have no basis for review of adverse decisions. The Tennessee Supreme Court has

ruled, however, that common law writs should be granted where denial of the writ is "tantamount to the denial to either party of a day in court." *State v. Johnson,* 569 S.W.2d 808, 815 (Tenn. 1978) (Finding exceptions to the general rule that the common law writ does not permit review of the correctness of a judgment.). As for the scope of review, the state courts have determined that a violation of a constitutional standard falls within the definition of "illegal, arbitrary, or fraudulent" actions which are reviewable under common law writs. *Hoover, Inc. v. Metro Bd. of Zoning Appeals*, 924 S.W.2d 900, 905 (Tenn.App. 1996.). Furthermore, "[u]nder the common law writ of certiorari, . . . [w]hether or not there is any material evidence to support the action of the agency is a question of law to be decided by the reviewing court *upon an examination of the evidence introduced before the agency*." *Watts v. Civil Serv. Bd. for Columbia,* 606 S.W.2d 274, 276-77 (Tenn. 1980) (Emphasis added.) Thus, the Court finds that Plaintiffs are incorrect in asserting that the "intrinsic correctness" of the Board's decisions under the Ordinance cannot be reviewed.

Plaintiffs argued at the hearing that a mistake in documentation for an entertainer as to his or her age, for example, would not be reviewable under a writ of *certiorari*. The Court submits that such an error is easily remedied by providing the correct documentation to the Board via a corrected or even a completely new application. Furthermore, in the Court's Memorandum granting the preliminary injunction, the Court referenced a proposed rule from Defendants that was more vague than the language ultimately used to amend the Ordinance and stated that the rule was flawed in that it was merely a proposal, but that an enacted version of the rule is "exactly

what must be promulgated in order to satisfy the judicial review requirements under the prior restraint doctrine." (Ct.'s Mem. at 15.) Defendant has come back to this Court with an amendment more specific than its proposed rule which mandates that decisions must be rendered by courts within an acceptable, specific period of time. Furthermore, the Ordinance now requires that a license issue if the judicial proceedings take longer than 40 days. This Court noted in its December 8, 1997 Memorandum that such a provision would meet the directives of the First Amendment. (*Id.*)

Based on the above analysis, this Court finds that Plaintiffs can no longer demonstrate a substantial likelihood of success on the merits, as they could when the preliminary injunction was originally issued. Therefore, although analysis of the original Ordinance favored the Plaintiffs with respect to the other three factors since Plaintiffs established a substantial likelihood of success on the merits, that is no longer the case.

B. Irreparable Harm

It is settled that non-obscene nude dancing is constitutionally protected activity within the scope of the First Amendment. *Barnes v. Glen Theaters. Inc.*, 501 U.S. 560, 565-66 (1991); *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d at 1075. However, since prior restraint of the dancing is no longer a substantial threat, the Court finds that irreparable harm will not be caused if the Ordinance as amended goes into effect.

C. Public Interest

Since the statute no longer presents a substantial possibility of infringing upon an individual's constitutional rights, the amelioration of the harmful side effects that sexually oriented businesses may promote is sufficient for this Court to find that this factor favors the Defendant.

D. Possibility of Substantial Harm to Others

This Court has found that an individual's constitutional rights are no longer at substantial risk under the Ordinance; therefore, it follows that there is no risk of substantial harm to others if the injunction is lifted. Indeed, this Court would harm the autonomy of the legislative bodies of the State of Tennessee and the City of Nashville if it continued to enjoin this Ordinance having found that Plaintiffs lack a substantial likelihood of success on the merits. Thus, this factor favors Defendant's position, as well.

III. Conclusion

The Court finds that the Ordinance as amended no longer presents substantial prior restraint problems since it provides for prompt judicial review of adverse decisions and the maintenance of the status quo while adverse decisions are appealed. Therefore, Plaintiffs can no longer demonstrate a substantial likelihood of success on the merits and the preliminary injunction issued by this Court on December 7, 1997 is no longer justified. Accordingly, Defendant's motion to dissolve that preliminary injunction is GRANTED and the injunction is hereby dissolved.

An Order consistent with this memorandum will be filed contemporaneously.

Entered this the 1st day of December, 1998.

/s/ John T. Nixon
JOHN T. NIXON,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.	
v.	No. 3:97-1066 Judge Nixon Magistrate Judge Griffin
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	
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JERRY C. PENDERGRASS, et al.,	No. 3:97-1176 Judge Nixon Magistrate Judge Griffin
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THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.	

ORDER

(Entered December 3, 1998)

Pending before the Court is Defendant's Motion to Dissolve Preliminary Injunction, (Doc. No. 34), to which Plaintiffs have filed a Response, (Doc. No 63). Defendant, in turn, has filed a Reply to Plaintiffs' Response. (Doc. No. 67.) For the reasons set forth in the accompanying memorandum, Defendant's motion is GRANTED and the preliminary injunction imposed in this case is hereby DISSOLVED.

It is so ORDERED.

Entered this the 1st day of December, 1998.

/s/ John T. Nixon
JOHN T. NIXON,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al.	]	
v.	]	No. 3:97-1066
	]	No. 3:97-1176
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.	]	Judge Higgins

MEMORANDUM

(Entered October 4, 1999)

The plaintiffs in this case are adult-oriented establishments, including adult cabarets, adult bookstores, and adult video stores in Metropolitan Nashville and Davidson County, Tennessee, owners and operators of such establishments, and individual dancers who perform at such establishments. On August 19, 1997, the Council of The Metropolitan Government of Nashville and Davidson County enacted Chapter 6.54 of the Metropolitan Code, Bill No. 097-796. This Chapter, and subsequently enacted amendments to it, require "sexually oriented" businesses to obtain a license to operate and entertainers who perform in such establishments to obtain a permit.

The initial plaintiffs in this case, Deja Vu of Nashville, Inc.; Michael Rucker; Michael Butler; Meroney Entertainment, Inc.; The Pleasure Palace, Inc.; Carousel Amusement Center, Inc.; Dawn Pierce; and Elizabeth

Martez,[1] filed this action on October 17, 1997, against The Metropolitan Government of Nashville and Davidson County, and Emmitt Turner, Chief of Police of the Metro Police Department, in his official capacity, seeking a preliminary injunction, permanent injunction and declaratory judgment determining the constitutionality of Chapter 6.54. *See also*, motion (filed October 17, 1997; Docket Entry No. 2) for issuance of a preliminary injunction. On December 1, 1997, a hearing was held before the Honorable John T. Nixon on the motions (Docket Entry Nos. 2 and 11) for a preliminary injunction. On the basis that the ordinance did not provide the proper procedural requirements for a prior restraint of expression protected by the First Amendment, the Court enjoined the defendants from enforcing the ordinance. Memorandum and order (entered December 8, 1997, Docket Entry Nos. 22 and 23) (Nixon, J.). After the Metro Council amended the ordinance to correct the defects upon which the preliminary injunction was based, the Court dissolved the injunction. Order (entered December 3, 1998, Docket Entry No. 76) (Nixon, J.).[2]

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[1] Mr. Jerry C. Pendergrass, The 822 Corporation, and 421 Corporation, subsequently initiated their own action (No. 3-97-1176) also seeking preliminary injunction, and sought to intervene in this action. Motion (filed December 17, 1998; Docket Entry No. 11) to intervene and for preliminary injunction. The Court consolidated the actions, deemed the Pendergrass et al. motion to intervene moot, and treated the plaintiffs' motions (Docket Entry Nos. 2 and 11) jointly. Memorandum and order (entered December 8, 1997, Docket Entry Nos. 22 and 23) (Nixon, J.).

[2] On December 16, 1998, the plaintiffs filed a motion (Docket Entry No. 77) for a stay pending appeal and on December 31, 1998, filed a notice of appeal (Docket Entry No. 94). Judge Nixon recused himself and the case was reassigned to The Honorable Aleta Trauger. *See* order (Docket Entry No. 97) (Nixon, J.). A hearing on the motions for stay

(Continued on following page)

The plaintiffs' second motion (filed December 17, 1998; Docket Entry No. 83) for preliminary injunction, which is now before the Court,[3,4] is based on claims previously reserved by the plaintiffs. *See* plaintiffs' motion (Docket Entry No. 2) for preliminary injunction.[5] In their second

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pending appeal and for preliminary injunction was held on January 13, 1999, and the motion for stay was denied. Order (entered January 26, 1999; Docket Entry No. 114) (Trauger, J.).The motions (Docket Entry Nos. 81 and 83) for preliminary injunction were set for further hearing on January 27, 1999. Order (entered January 26, 1999; Docket Entry No. 115) (Trauger, J.). By order (Docket Entry No. 109) entered January 20, 1999, the Pendergrass et al. motion (filed December 16, 1998; Docket Entry No. 80) to file an amended complaint was granted, and the amended complaint (Docket Entry No. 121) was filed January 20, 1999.

[3] By order (Docket Entry No. 122) entered February 3, 1999, Judge Trauger recused herself and the case was reassigned to Judge Nixon. By order (Docket Entry No. 124) entered February 18, 1999, Judge Nixon returned the case to the clerk for reassignment. The case was assigned to this Court.

[4] Also before the Court is the plaintiffs' memorandum (filed December 17, 1998; Docket Entry No. 84) in support; the motion (filed December 17, 1998; Docket Entry No. 81) of Jerry Pendergrass and The 822 Corporation for preliminary injunction and their memorandum (Docket Entry No. 82) in support; the plaintiffs' supplemental brief (filed December 31, 1998; Docket Entry No. 96) in support of their second motion for preliminary injunction; the defendants' memorandum (filed January 8, 1999; Docket Entry No. 104) in opposition; the plaintiffs' reply (filed January 22, 1999; Docket Entry No. 111); the defendants' response (filed January 22, 1999; Docket Entry No. 112); and the response (filed January 22, 1999; Docket Entry No. 113) of Jerry C. Pendergrass, The 822 Corporation and 421 Corporation.

[5] Also before the Court is the defendants' notice of filing (filed June 7, 1999; Docket Entry No. 157) with attached letters dated May 26, 1999, from the Sexually Oriented Business Licensing Board, informing Metro News c/o Jerry Pendergrass; Madam X c/o C.L. Steele; Purple Onion II c/o C.L. Steele; Purple Onion I c/o C.L. Steele; Ken's Gold Club c/o Ken Meroney; and Mr. Mike Rucker c/o Deja Vu; that their applications for sexually oriented business licenses have been approved; the plaintiffs' motion (filed June 15, 1999; Docket Entry No. 165) to strike

(Continued on following page)

motion, the plaintiffs contend that, both facially and as applied, Chapter 6.54 violates the First and Fourteenth Amendments to United States Constitution. The plaintiffs also assert that the defendants are collaterally estopped from relitigating the constitutionality of some provisions of the ordinance which were present in a predecessor ordinance to Chapter 6.54, and which the Court found unconstitutional in *Ellwest Stereo Theater v. Boner*, 718 F. Supp. 1553 (M.D. Tenn. 1989) (Higgins, J.). In their motion (Docket Entry No. 81) Mr. Pendergrass and The 822 Corporation reassert their earlier claim that the civil disabilities provision of the ordinance are unconstitutional. *See* motion (Docket Entry No. 81) for preliminary injunction and memorandum (Docket Entry No. 82) in support. Accordingly, the plaintiffs seek declaratory relief in the form of a preliminary injunction under Fed. R. Civ. P. 57 and 28 U.S.C. §§ 2201 and 2202.

The Court has jurisdiction over this matter under 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1334(3) and §§ 2201 and 2202. The motions were heard on oral testimony from April 13 to April 16, 1999. For the reasons set forth below, the plaintiffs' motions for preliminary injunction shall be granted.

I.

The Court must consider the following four factors in determining whether or not to grant a preliminary Injunction:

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defendants' notice of filing; their brief (Docket Entry No. 166) in support; and the defendants' response (filed June 28, 1999; Docket Entry No. 174).

> (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

Connection Distrib. Co. v Reno, 154 F.3d 281, 288 (6th Cir. 1998) (quoting *Golden v Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir. 1996), *cert. denied*, 519 U.S. 807, 117 S.Ct. 49, 136 L.Ed.2d 12 (1996)). The general rule with respect to these factors is that courts are not to give greater weight to any one factor is particular, but are to balance them. *Id.*

When a preliminary injunction is sought because rights guaranteed by the First Amendment are potentially at stake, the first factor, likelihood of success on the merits, will be determinative. *Id.* The Supreme Court of the United States has stated that "'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2573, 2690, 49 L.Ed.2d 547, 565 (1976) (plurality) and *citing Newsom v Norris*, 888 F.2d 371, 378 (6th Cir. 1989) for the proposition that "even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."). Therefore, "to the extent that [a party] can establish a substantial likelihood of success on the merits of its First Amendment claim, it also has established the possibility of irreparable harm as a result of the deprivation of the claimed free speech rights." *Id.* (citation omitted). Additionally, because "'it is always in the public interest to prevent the violation of a party's constitutional rights,'" harm to the public interest is also

established by showing a substantial likelihood of success on the merits. *Id.* (quoting, *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)).

II.

Sexually explicit, non-obscene performances and materials are expressions protected by the First Amendment to the United States Constitution. *Young v. American Mini Theatres Inc.*, 427 U.S. 50, 70, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310, 326 (1976). However, society is considered to have less interest in protecting this kind of expression than in protecting other kinds of speech. *Id.* Consequently, sexually explicit expression falls within the "outer perimeters of the First Amendment." *Barnes v. Glen Theatre Inc.*, 501 U.S. 560, 566, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504, 511 (1991); *see also, Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 438 (6th Cir. 1998). Accordingly, the type of expression which Chapter 6.54 of the Metropolitan Code seeks to regulate is on the "outer perimeters" of expression protected by the First Amendment. *Id.*

Under the due process requirement of the Fourteenth Amendment to the United States Constitution, laws must clearly define the conduct they proscribe. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222, 227 (1972). The vagueness of laws that attempt to regulate speech raises "special concerns under the Federal Constitution's First Amendment because of the obvious chilling effect of such regulations on free speech." *Reno v. ACLU*, 521 U.S. 844, 845, 117 S.Ct. 2329,

2332, 138 L.Ed. 874, 876 (1997). Such laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108, 92 S.Ct. at 2298, 33 L.Ed.2d at 227. This requirement was explained as follows:

> [v]ague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant danger of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Id. (footnotes omitted).

In determining whether an ordinance is impermissibly vague, the Court "'must extrapolate its allowable meaning'" while keeping in mind the prohibition on federal courts from construing state statutes. *Id.*, 408 U.S. at 110, 92 S.Ct. at 2300, 33 L.Ed.2d at 228 (quoting *Garner v. Louisiana*, 368 U.S. 157, 174, 82 S.Ct. 248, 257, 7 L.Ed.2d 219 (1961)). In doing so, the Court is "'relegated . . . to the words of the ordinance itself,' to the interpretations [other courts] have given to analogous statutes, and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it." *Id.*

(quoting *Coates v. Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.E.2d 214, 217 (1971)).

A law will be considered impermissibly vague if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed.2d 322, 328 (1926). However, if the meaning of the law is commonly understood, it will not be considered vague. *See United States v. J. T. Haun*, 90 F.3d 1096, 1101 (6th Cir. 1996). Additionally, the prohibited conduct need not be defined with mathematical precision. *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1108 (6th Cir. 1995). Nor is a law vague because it "'requires a person to conform his conduct to an imprecise but comprehensible normative standard.'" *Id.* (quoting *United States v. Angiulo*, 897 F.2d 1169, 1179 (1st Cir.), *cert. denied*, 498 U.S. 845, 111 S.Ct. 130, 112 L.Ed.2d 98 (1990)).

In addition, laws which are overbroad, threatening the exercise of First Amendment rights, are unconstitutional. *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Recognizing that the application of the overbreath doctrine is "'strong medicine,'" the Supreme Court has "employed it with hesitation and then 'only as a last resort.'" *New York v. Ferber*, 458 U.S. 747, 769, 192 S.Ct. 3348, 3361, 73 L.Ed.2d 1113, 1130 (1982) (quoting *Broadrick*, 413 U.S. at 613, 93 S.Ct. at 2916, 37 L.Ed.2d at 840).

Moreover, the overbreath must be substantial when the protected expression involves conduct and not speech only. *Id.*, 458 U.S. at 770, 102 S.Ct. at 3361, 73 L.Ed.2d at 1131 (citing *Broadrick*, 413 U.S. at 615, 93 S.Ct. at 2918,

37 L.Ed.2d at 842). Accordingly, a regulation should not be invalidated for overbreath if it marginally infringes on First Amendment freedoms. *Id.*, 458 U.S. at 770 n.25, 192 S.Ct. at 3362 n.25, 73 L.Ed.2d at 1131 n.25. A law is substantially overbroad if it "reaches a substantial number of impermissible applications," *Ferber*, 458 U.S. at 771, 102 S.Ct. at 3362, 73 L.Ed.2d at 1132, "judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615, 93 S.Ct. at 2918, 37 L.Ed.2d at 842. Additionally, laws are unconstitutional if they impose restrictions so broad they cause concern over violating the law thereby, creating a "chilling effect" that curtails the availability of non-obscene expression. *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); *see also, Bantam Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1962).

A facial challenge can be raised on behalf of others under an exception to the ordinary standing requirements on the basis that a law is substantially overbroad. *Regan v. Time*, 468 U.S. 641, 650, 104 S.Ct. 3262, 3268, 82 L.Ed.2d 487, 496 (1984). To prevail on such an attack, the plaintiff must establish that there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.'" *New York State Club Assn. v. New York City*, 487 U.S. 1, 11, 108 S.Ct. 2225, 2233, 101 L.Ed.2d 1, 15 (1988) (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772, 784 (1984)).

Due to concerns of federalism that arise when a federal court reviews the constitutionality of a state regulation that is challenged as unconstitutionally vague or overbroad, the reviewing court may not supply a limiting

construction in order to save the regulation from being unconstitutional. *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 136 (6th Cir. 1994) (citing *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991) for the proposition that "federal 'courts do not rewrite statutes to create constitutionality.'").

Under our First Amendment jurisprudence, protected expressions may be subject to "reasonable time, place or manner" restrictions. *Barnes*, 501 U.S. at 566, 111 S.Ct. at 2461, 115 L.Ed.2d at 511 (1991) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221, 227 (1984)). Such a regulation is valid if:

1. If it is within the constitutional power of the government;
2. If it furthers an important or substantial governmental interest;
3. If the government interest is unrelated to the suppression of free expression; and
4. If the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[6]

Id., 501 U.S. at 567, 111 S.Ct. at 2461, 115 L.Ed.2d at 512 (quoting *United States v. O'Brien*, 391 U.S. 367, 377, 88

[6] In *Clark*, the Supreme Court noted that the four part *O'Brien* test for reviewing the constitutionality of regulations of expressive conduct is really the same test as that for time, place, or manner regulations. *Clark*, 468 U.S. at 298, 104 S.Ct. at 3070, 82 L.Ed.2d at 230. This test asks whether the law is content neutral, is "designed to serve a substantial government interest, and allows alternative avenues of communication." *Richland Bookmart*, 137 F.3d at 440.

S.Ct. 1673, 1679, 20 L.Ed.2d 672, 680 (1968)). The United States Court of Appeals for the Sixth Circuit and other courts have applied this test when reviewing the constitutionality of laws regulating sexually oriented businesses. *See DLS, Inc. v. City of Chattanooga,* 107 F.3d 403, 410 (6th Cir. 1997); *Ellwest*, 718 F. Supp. at 1562; *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980).

III.

The plaintiffs do not contest that The Metro government has the constitutional power to enact Chapter 6.54. The plaintiffs contend that Chapter 6.54 is invalid under the second element of the *O'Brien* test because it does not further an important or substantial governmental interest.

The preamble to Chapter 6.54 states that the purpose of the ordinance is "to promote the health, safety, morals and general welfare of the citizens of Metropolitan Nashville Davidson County." Plaintiffs' exhibit 6. In *Barnes,* the United States Supreme Court upheld Indiana's public indecency statute which was "designed to protect morals and public order," stating that "[t]he traditional police powers of the States is defined as the authority to provide for the public health, safety, and morals and we have upheld such as a basis for legislation." *Barnes,* 501 U.S. at 569, 111 S.Ct. at 2462, 115 L.Ed.2d at 513. Moreover, a "city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *American Mini Theatres*, 427 U.S. at 71, 96 S.Ct. at 2452, 49 L.Ed.2d at 327.

The evidence reflects that when considering Chapter 6.54, the Metro Council reviewed relevant information and studies from other cities and states evaluating the

problems caused by the presence of adult entertainment establishments. *See* notice (filed April 12, 1999; Docket Entry No. 147).[7] Specifically, the Metro Council relied on studies from Minnesota, Phoenix, Tucson, Arizona, and Austin, Texas. These studies indicated that the secondary effects of adult entertainment establishments threaten the health, safety, and welfare of the citizens where they are located. *Id.*

The Metro Council also relied on information collected in Nashville, including: (1) a report from the Metro Police Department stating that undercover officers observed substantial physical contact between dancers in adult entertainment establishments and the patrons of these establishments and that the undercover officers were successful in soliciting prostitution from several women at various establishments; (2) a report from the Metropolitan Health Department of Nashville and Davidson County of an inspection of ten adult entertainment establishments on April 16 and 17, 1997, which stated that "the presence of fresh suspected body fluid was evident in six of the ten establishments inspected;" and (3) a Metropolitan Police Department Intelligence Division Report showing that between January 1, 1996, and January 31, 1997, there were 924 dispatched calls[8] to 36 adult entertainment establishments, of which, 682 required police assistance

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[7] A city may rely on studies and experiences of other cities in determining whether a regulation furthers a substantial governmental interest. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51, 106 S.Ct. 925, 931, 89 L.Ed.2d 29, 40 (1986).

[8] These calls included: 30 drunk calls, 189 police assistance calls, 143 disorderly calls, 27 vehicle accident calls, 95 theft calls, 45 robbery calls, 24 weapons calls, 32 fighting calls, 64 burglary alarm calls, and 33 tavern check calls. Notice (Docket Entry No. 147) at tab 3.

and involved possible violations of laws or ordinances. *Id.* at tab 3.

In light of these studies and reports, the Metro Council set forth in the preamble to Chapter 6.54 the findings that: (1) sex acts are a regular occurrence at adult entertainment establishments in Davidson County, especially were there are private or semi-private booths for viewing films or live sex shows; (2) that certain employees of adult entertainment establishments engage in higher incidents of unlawful activities than others; (3) that the sex acts and resulting unsanitary conditions occurring at some adult entertainment establishments are the result of the failure of the management of those establishments to regulate activities within those establishments; and (4) that other illegal or unhealthy activities occur as a consequence of these conditions. *See,* plaintiffs' exhibit 6. The findings also include the statistics on the number of cases of sexually transmitted diseases, including acquired immunodeficiency syndrome (AIDS), gonorrhea, and syphilis in Tennessee and Davidson County. *Id.*

Based on the information relied upon by the Metro Council in promulgating Chapter 6.54, and its resulting findings as stated in the preamble, the Court finds that the Metro Council's purpose in enacting Chapter 6.54 was "to promote the health, safety, morals and general welfare of the citizens of Metropolitan Nashville Davidson County" by reducing the spread of diseases which thrive in the conditions created by unregulated adult entertainment establishments and to combat the illegal activity that occurs within and around such establishments. Plaintiffs exhibit 6. Accordingly, the Court finds that the ordinance was promulgated to further an important and substantial governmental interest.

The plaintiffs further contend that Chapter 6.54 is invalid under the third element of the *O'Brien* test because it is a content-specific regulation, aimed at suppressing free expression.

The Court agrees that the regulation pertains exclusively to sexually explicit expression. However, because Chapter 6.54 is focused on the secondary effects of the expression, it will be treated as a content-neutral time, place, or manner regulation.[9] *Richland Bookmart,* 137 F.3d at 439-40. Therefore, the third element of the *O'Brien* test has been met.

The plaintiffs also contend that various portions of the ordinance do not satisfy the fourth element of the *O'Brien* test. The requirement that a regulation must be narrowly tailored to serve the government's interest does not require that the regulation be the "least restrictive or least intrusive means of doing so." *Ward v. Rock Against Racism,* 491 U.S. 781, 798, 109 S.Ct. 2746, 2757-58, 105 L.Ed.2d 661, 679 (1989). Instead, a time, place, or manner

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[9] In *Richland Bookmart*, 137 F.3d at 439-40, the Sixth Circuit found that a regulation which focused exclusively on sexually explicit speech was content-specific on its face. However, the Court explained that although content-specific regulations are generally presumed to be unconstitutional and are subject to strict scrutiny, the Supreme Court has created a legal fiction under which regulations of erotic or sexually explicit expression are treated as if they are content-neutral providing that the regulation is really aimed at the secondary effects of the speech, rather than at the speech itself. *Id.* at 440 (*citing City of Renton*, 475 U.S. at 49, 106 S.Ct. at 929-30, 89 L.Ed.2d at 38-40 and *American Mini Theatres*, 427 U.S. at 70, 96 S.Ct. at 2452, 49 L.Ed.2d at 340). The Supreme Court explained that regulations focusing on sexually explicit expression may be treated differently than regulations of other expression because the interest in protecting sexually explicit speech is marginal. *American Mini Theatres*, 427 U.S. at 72, 96 S.Ct. at 2452, 49 L.Ed.2d at 340.

regulation is narrowly tailored "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest." *Id.*, 491 U.S. at 800, 109 S.Ct. 2758, 105 L.Ed.2d at 679.

A. Civil Disabilities Provision[10]

The plaintiffs contend that the civil disabilities provision of Chapter 6.54 is not narrowly tailored to serve the government's interest. They also contend that the defendants are collaterally estopped from relitigating the constitutionality of the civil disabilities provision based on the Court's decision in *Ellwest,* 418 F. Supp. at 1568, that the civil disabilities provision in the predecessor ordinance was not narrowly tailored to serve the government's interest. The plaintiffs also challenge the civil disabilities provision as an impermissible prior restraint on their First Amendment rights.

The ordinance requires that sexually oriented corporations, corporate stockholders holding a majority share of stock who will be involved in the day to day operation of the business, officers, and directors be licensed. Plaintiffs' exhibit 5 at §§ 6.54.040(A)(1)&(4). Individual entertainers must also obtain a permit. Chapter 6.54.060(A).

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[10] The parties refer to these provisions as the criminal disabilities provisions but in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 607, 107 L.Ed.2d 603, 621 (1990), the Supreme Court refers to a similar provision as the civil disabilities provision. The Supreme Court did not reach the merits of the plaintiff's challenge to the civil disabilities provision in *FW/PBS* because the Court found that the plaintiffs did not have standing to challenge the provision. *Id.*, 493 U.S. at 233, 110 S.Ct. at 608, 107 L.Ed. 2d at 623.

Under the civil disabilities provision of the ordinance, no individual applicant for a license or permit who has had a misdemeanor conviction for a crime of a sexual nature[11] may receive a license or permit for two years following the date of the conviction and no applicant who has had a felony conviction for a crime of a sexual nature may receive a license or permit for five years following the date of the conviction. *Id.* at §§ 6.54.050(B)(2) and 6.54.080(A)(2).

1. *standing*

That "[t]he federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS,* 493 U.S. at 231, 110 S.Ct. at 607, 107 L.Ed.2d at 621 (quoting *Allen v. Wright,* 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556, 569 (1984)). The party seeking to exercise jurisdiction must "'clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *Id.*, 493 U.S. at 231, 110 S.Ct. at 608, 107 L.Ed.2d at 622 (quoting *Warth v.*

[11] Chapter 6.54.010(C) defines "crimes of a sexual nature" as:

> the crimes of rape, aggravated rape, aggravated sexual assault, public indecency, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or crimes committed in a jurisdiction other than Tennessee which, if committed in this state, would have constituted the crimes listed above. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used to determine what classification the offense is given.

Plaintiffs' exhibit 5.

Seldin, 422 U.S. 490, 518, 95 S.Ct. 2197, 2215, 45 L.Ed.2d 343, 366 (1975)). A party asserting standing must prove:

> (1) "injury in fact," by which we mean an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury fairly can be traced to challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative.

DLS, 107 F.3d at 414 (citing *G & V Lounge,* 23 F.3d at 107).

Accordingly, to establish standing to challenge the civil disabilities provision of the ordinance, individual plaintiffs must show that they are required to obtain a permit or license under the ordinance and that they will be unable to do so because they were convicted of a misdemeanor of a sexual nature within two years of their application, or that they were convicted of a felony of a sexual nature within five years of their application. *See, FW/PBS,* 493 U.S. at 234, 110 S.Ct. at 609, 107 L.Ed.2d at 624. In order for a sexually oriented business to have standing, it must show that it will be unable to obtain a license because an individual applicant, such as a corporate director or officer who is required to be licensed in order for the business to be licensed, will be ineligible to obtain a license due to the civil disabilities provision.

Deja Vu and Mr. Michael Butler assert that they have standing to challenge the civil disabilities provision of the ordinance. As a sexually oriented business, Deja Vu is required to be licensed under Chapter 6.54. Michael Butler and Deja Vu contend that Mr. Butler is a former vice-president of Deja Vu and that if he were still a vice-president he would also be required to obtain a license.[12] The plaintiffs presented evidence that in November of 1994, Mr. Butler was convicted under the Uniform Code of Military Justice with felony statutory rape.[13] Mr. Butler's conviction was for a felony of a sexual nature and was within five years of March 15, 1999, when Chapter 6.54.030(F) would have required him to apply for a license. Accordingly, Mr. Butler would be prohibited from obtaining a license under the civil disabilities provision of Chapter 6.54. Deja Vu argues that it also has standing because if Mr. Butler had remained a vice-president, it would have been unable to obtain a license to operate under the civil disabilities provision of the ordinance because, in order to do so, Mr. Butler would have had to be licensed.

The Court finds that because Mr. Butler is no longer employed by Deja Vu as a vice-president, he is no longer required to obtain a license as a corporate officer of Deja Vu. Additionally, Deja Vu would not be prohibited from receiving a license based on Mr. Butler's conviction. Accordingly, neither Mr. Butler nor Deja Vu have standing

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[12] Mr. Butler testified that he resigned from his position at Deja Vu in November of 1998, only because of the licensing requirement.

[13] Mr. Bulter testified to this fact and also submitted an affidavit affirming it. Affidavit (filed December 17, 1998; Docket Entry No. 86) of Michael Butler.

to challenge the constitutionality of the civil disabilities provision of the ordinance.

Mr. Pendergrass and The 822 Corporation also challenge the civil disabilities provisions of the ordinance. The plaintiffs aver that Metro News, which is owned by The 822 Corporation, is a theater and retail bookstore dealing in the display and retail sale and rental of printed and pictorial materials of an erotic and sexual nature and is, therefore, a sexually oriented bookstore required to be licensed under Chapter 6.54. Mr. Pendergrass is the sole shareholder, an officer, and a director of The 822 Corporation. Therefore, in order for The 822 Corporation to be licensed under the ordinance, Mr. Pendergrass must also be licensed. At the hearing, Mr. Pendergrass testified that he was convicted on May 22, 1997, of a misdemeanor obscenity offense in Hamilton County, Tennessee. He was required to apply for a license in Nashville by March 15, 1999, within two years of the date of that conviction. Therefore, pursuant to the civil disabilities provision of the ordinance, Mr. Pendergrass, and consequently The 822 Corporation, would be ineligible for a license. Accordingly, the Court finds that Mr. Pendergrass and The 822 Corporation have standing to challenge the civil disabilities provision of the ordinance.[14]

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[14] In their motion (Docket Entry No. 165) to strike the defendants' notice (Docket Entry No. 157), the plaintiffs' contend that the notice goes to the issue of whether the plaintiffs have standing to challenge certain aspects of the licensing provisions in Chapter 6.54 in their second motions (Docket Entry Nos. 81 and 83) for preliminary injunction. They argue that their motion to strike should be granted because at the end of the hearing on the plaintiffs' motions, the Court stated:

2. *collateral estoppel*

The plaintiffs claim that the defendants are collaterally estopped from relitigating the constitutionality of the civil disabilities provision of the ordinance based on the Court's holding in *Ellwest* that the civil disabilities provision of the predecessor ordinance was unconstitutional because it was not narrowly tailored to serve the government's interest.

The defendants assert that collateral estoppel does not apply to bar relitigation of any provisions in Chapter 6.54 because "[t]he law regulating sexually explicit expression has changed over the past ten years such that regulations that may have been unconstitutional in 1989 may be constitutional now." Defendants' memorandum (Docket Entry No. 104) at 15.

Collateral estoppel does not apply when there has been a significant change in the applicable law. *Disabled Am. Veterans v. Commissioner of Internal Revenue*, 942 F.2d 309, 313 (6th Cir. 1991); *see also*, *Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 913 (9th Cir.

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this is the evidentiary record on the application for preliminary injunction and when we close here today this is going to constitute the record.

Plaintiff's brief (Docket Entry No. 166) in support at 2.

Accordingly, the Court finds that the record for the motions (Docket Entry Nos. 81 and 83) for second preliminary injunction was closed at the end of the evidentiary hearing on April 15, 1999. As the defendants have not been granted leave to file additional materials, the Court shall grant the plaintiffs' motion (Docket Entry No. 165) to strike insofar as the notice relates to the plaintiffs' motions (Docket Entry Nos. 81 and 83). Accordingly, the defendants' notice will not be considered evidence in support of, or in opposition to, the plaintiffs' second motions for preliminary injunction. However, the plaintiffs' motion (Docket Entry No. 165) to strike shall be denied in all other respects.

1997). The Supreme Court has found that such a change may occur when there is a "'judicial declaration intervening between the two proceedings . . . a modification or growth in legal principles as enunciated in intervening decisions of this Court . . . [or] an interposed alteration in the pertinent statutory provisions.'" *Disabled Am. Veterans*, 942 F.2d at 313 (quoting *Sunnen v. Commissioner of Internal Revenue*, 333 U.S. 591, 600, 68 S.Ct. 715, 720, 92 L.Ed. 898, 907 (1948)).

The defendants have not established that there has been a sufficient change in the case law between the time the Court rendered its decision in *Ellwest* and now regarding the provisions of the ordinance that the plaintiffs contend the defendants cannot relitigate.

The defendants also argue that collateral estoppel does not apply because the precise issues raised in this case are different from those litigated in *Ellwest*. In order for litigation of an issue to be barred based on collateral estoppel, "the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding." *N.A.A.C.P., Detroit Branch v. Detroit Police Officer's Assoc.*, 821 F.2d 329, 330 (6th Cir. 1987) (footnote omitted).[15] The defendants contend that the issues in this case are different than the issues in *Ellwest* because the purpose of the ordinance in *Ellwest* was only to protect the health of the citizens of Nashville and Davidson County,

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[15] Collateral estoppel also requires that a "determination of the issue must have been necessary to the outcome of the prior proceeding; that the prior proceeding must have resulted in a final judgment on the merits; and that the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issues in the prior proceeding." *N.A.A.C.P. Detroit Branch*, 821 F.2d at 330.

whereas the purpose of Chapter 6.54, presently before the Court, is the broader purpose of promoting "the health, safety, morals, and general welfare of the citizens of Metropolitan Nashville Davidson County." Defendants' memorandum (Docket Entry No. 104) at 17.

The record reflects that the first paragraph of the ordinance under consideration in *Ellwest* states that the purpose of the ordinance is to protect and promote the "general welfare, health, and safety" of Nashville's citizens. Plaintiffs' reply (filed January 22, 1999; Docket Entry No. 111) to defendants' memorandum of law in opposition. Accordingly, the purpose of Chapter 6.54 is broader only insofar as it also states that its purpose is to protect the morals of the citizens of Nashville.

The Court finds that the fact that the government added that the purpose of the ordinance is to protect the morals of the citizens is not sufficient to change the issue of the constitutionality of the ordinance. Accordingly, collateral estoppel is not inapplicable based on the allegedly broader purpose of Chapter 6.54.

With respect to the civil disabilities provision in particular, the defendants assert that collateral estoppel does not apply because the issue with respect to the constitutionality of the civil disabilities provision in this case is different from that in *Ellwest*. In *Ellwest,* the ordinance provided that applications for permits and licenses were to be denied if the applicant had been convicted or pleaded *nolo contendre* "to a felony or any crime involving moral turpitude, prostitution, obscenity or any crime of a sexual nature in any jurisdiction within the five (5) years immediately preceding the date of the application." *Ellwest,* 718 F. Supp. at 1568 (quoting

Section 5(a)(1)(ii) of Metropolitan ordinance (Bill No. 086-1549)).[16] In contrast, Chapters 6.54.050(B)(2) and 6.54.080(A)(2) limit the crimes for which an application may be denied to convictions of felonies or misdemeanors for crimes of a sexual nature. Plaintiffs' exhibit 5. Accordingly, the Court finds that the precise issue in this case was not litigated in *Ellwest* and that the defendants are not collaterally estopped from litigating the constitutionality of the civil disabilities provision in Chapter 6.54. *N.A.A.C.P., Detroit Branch,* 821 F.2d at 330.

3. *prior restraint*

The plaintiffs challenge the civil disabilities provision of Chapter 6.54 as an impermissible prior restraint on protected expression. They argue that the government cannot preclude a person or his employer from obtaining a license or permit to engage in constitutionally protected expression based on the fact that the person was previously convicted of obscenity.

Although laws may validly prohibit certain types of expression not protected by the First Amendment, a prior restraint on the exercise of First Amendment rights is "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stewart*, 427

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[16] This provision was found to be unconstitutional because it was not narrowly tailored to serve the government's interest in denying applications to those who were likely to operate their business in contravention of the ordinance. *Ellwest*, 718 F. Supp. at 1568. The Court reasoned that if the disclosure requirement had been limited to "such crimes as prostitution," rather than to any felony, there may have been a "reasonable inference that the applicant would be more likely to operate an adult-oriented establishment in contravention of the ordinance." *Id.*

U.S. 539, 559, 96 S.Ct. 2781, 2803, 49 L.Ed.2d 683, 697 (1975). Accordingly, "'[*any* system of prior restraints of expression [bears] a heavy presumption against its constitutional validity.'" *Vance v. Universal Amusement Co. Inc.*, 445 U.S. 308, 317, 100 S.Ct. 1156, 1162, 63 L.Ed.2d 413, 421 (1980) (quoting *Bantam Books,* 372 U.S. at 70, 83 S.Ct. at 639, 9 L.Ed.2d. at 593 (emphasis in original) (citations omitted)). Prior restraints against expression protected by the First Amendment are disfavored because "[i]t is difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable," *Vance*, 445 U.S. at 315 n.13, 100 S.Ct. at 1161 n.13, 63 L.Ed.2d at 420 n.13 (citations omitted).

In *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986), *cert. denied,* 479 U.S. 915, 107 S.Ct. 316, 93 L.Ed.2d 290 (1986), the Sixth Circuit considered the constitutionality of a nuisance abatement law which required the business license of distributors and exhibitors of adult oriented materials to be revoked if it was judicially determined that they had distributed obscene materials. The Court found that if:

> the abatement procedure focuses on regulating the future speech of a defendant who has been adjudged "guilty" of distributing obscene material, the law is tantamount to a licensing statute establishing a prior restraint of the defendant's first amendment right to engage in nonobscene expression. To use the language of *Near v. Minnesota,* a nuisance abatement procedure applied to obscenity should be upheld if "[t]he object of the [procedure] is punishment, in the ordinary sense, [rather than] suppression of the offending

> [business]" and if the procedure does not "operat[e] to . . . put the publisher under an effective censorship." 283 U.S. at 709-12, 51 S.Ct. at 628-30.

City of Paducah, 791 F.2d at 469. The Court went on to find that the ordinance was an impermissible prior restraint because it went "beyond merely deterring or punishing individuals who deal in obscene materials . . . to control [their] future expression." *Id.* at 470.

The Sixth Circuit further noted that the Supreme Court has permitted prior restraints provided that the following procedural safeguards are in place to prevent the prior restraints from causing censorship:

> the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period of time and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

Id. (quoting *Southeastern Promotions, Ltd. v. Conrad*, 402 U.S. 546, 560, 95 S.Ct. 1239, 1247, 43 L.Ed.2d 448, 460 (1975)).

In *City of Paducah*, the Sixth Circuit found that there were adequate safeguards within Paducah's nuisance abatement ordinance. *Id.* Nevertheless, the Court found that the ordinance was unconstitutional because it "would still operate as a prior restraint on plaintiff's future distribution of non-obscene materials." *Id.*

Based on the Sixth Circuit's conclusion in *City of Paducah*, the Court finds that, because Chapter 6.54

requires the sexually oriented licensing board to deny applicants a license or permit based on a prior conviction of obscenity, the civil disabilities provision of the ordinance is an unconstitutional prior restraint. Accordingly, the Court finds that there is a substantial likelihood that the plaintiffs will succeed on the merits of their challenge to the civil disabilities provision of the ordinance.[17]

The defendants cite *Ino Ino, Inc. v. City of Bellevue*, 937 P.2d 154 (Wash. 1997), and *DLS*, 1107 F.3d 403 (6th Cir. 1997), in support of the constitutionality of the civil disabilities provision. However, the Court finds that these cases do not support the constitutionality of the civil disabilities provision in Chapter 6.54.

In *Ino Ino*, the plaintiffs challenged a similar civil disabilities provision only as a violation of the applicant's right to privacy. *Ino Ino*, 937 P.2d at 167-68. Accordingly, the Court does not find the decision in *Ino Ino* to uphold the civil disabilities provision in that case to be instructive. In *DLS,* the Sixth Circuit upheld a similar civil disabilities provision in a Chattanooga ordinance regulating sexually oriented businesses. The civil disabilities provision in that case prohibited an applicant from receiving a license or permit if the applicant had been convicted of or pleaded *nolo contendre* to "a felony or any crime involving moral turpitude, prostitution, obscenity, or other

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[17] In *Ellwest,* this Court noted that "the practice of denying a person a license to engage in activities protected by the First Amendment based on prior convictions is constitutionally suspect. In particular, the courts have consistently struck down ordinances which permit or require the denial or revocation of a license to show adult-oriented motion pictures on the basis that an applicant or an employee of an applicant has been convicted of obscenity." *Ellwest*, 718 F. Supp. at 1572 n.5 (citations omitted).

crime of a sexual nature." *DLS,* 107 F.3d at 414. The plaintiffs "only argument" against the civil disabilities provision of the Chattanooga ordinance was "the fact that they were not enforced against the productions of *Hair* or *Oh! Calcutta!* demonstrates that they vest the City with unbridled discretion to award or deny licenses or permits." *Id.* Accordingly, the Sixth Circuit did not address whether it was permissible to deny a person a license to engage in expression protected by the First Amendment because they had a previous conviction for obscenity. Therefore, the Court does not find the Sixth Circuit's decision to uphold the civil disabilities provision in that case to be determinative on the facts in this litigation.

B. Disclosure of Personal Information

The plaintiffs next challenge the provisions of Chapter 6.54 requiring that applicants disclose certain personal information. The plaintiffs challenge the requirement in Chapter 6.54.040(A)(5)(c) and 6.54.070(A)(4)(c) that applicants disclose their residential addresses for the past three years, the requirements in Chapter 6.54.040(A)(5)(g) and 6.54.070(A)(4)(g) that applicants submit their fingerprints and two portrait photographs, and the requirement in Chapter 6.54.070(A)(4)(d) that applicants disclose their "height, weight, color of eyes, and hair." Plaintiffs' exhibit 5.

The government contends, and the ordinance states, that applicants are required to comply with these provisions "for the purpose of facilitating the police investigation into the applicant's criminal background." Plaintiffs' exhibit 5, Chapter 6.54.040(A)(5)(c) & (g), 6.54.070(A)(4)(c), (g) & (d).

In light of the fact that the Court has found the plaintiffs are likely be successful on their challenge to the civil disabilities provision of the ordinance, the Court further finds that it is also likely that the plaintiffs will be successful on their challenge to the disclosure requirements, as the only purpose for their inclusion in the ordinance is to facilitate the civil disabilities provision.[18]

C. Fee Requirements

Chapter 6.54.090 imposes a $500 fee on applications for a license and a $100 fee for applications for a permit. The plaintiffs challenge the constitutionality of these fees by asserting that they are excessive and are unconstitutional insofar as they are imposed to facilitate portions of the application process the Court has concluded will likely be found unconstitutional. The defendants contend that the fees are narrowly tailored to facilitate the administration of the ordinance and are, therefore, not excessive.

It is well established that the government may not tax the exercise of a constitutionally protected right. *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109 (6th Cir. 1997). However, "an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred

[18] Moreover, at the hearing on the plaintiffs' motions, Captain Judith D. Bawcum, an officer with the Metropolitan Police Department, testified that in order to run a criminal background check, the police use the person's name and date of birth, and that they sometimes also use a fingerprint if the person goes to the police station.

in furtherance of a legitimate state interest." *Id.* at 1109-1110. Such a fee is not excessive, even if it is more than nominal, so long as it is "'reasonably related to the expenses incident to the administration of the ordinance.'" *Id.* at 1110 (quoting *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1136 (6th Cir. 1991)).

The deposition testimony of Mr. Terry Cobb, Director of the Codes Department of Metropolitan Nashville Davidson County, established that the direct costs of processing permits for entertainers is $43, which includes: (1) $24 for the criminal background check; (2) $9 for fingerprinting; and (3) $10 for a photo identification. Brief (Docket Entry No. 84) in support of plaintiffs' second motion for preliminary injunction, attachment, exhibit W at 24-25. The direct costs of processing individual license applications is $33, which includes: (1) $24 for the criminal background check; and (2) $9 for fingerprinting. *Id.*

In light of the fact that the Court has found that the civil disabilities provision of Chapter 6.54 is likely to be found unconstitutional, the Court further finds that, insofar as the fees charged under Chapter 6.54.090 are for the administration of the civil disabilities provision, there is a substantial likelihood that the plaintiffs will also succeed on their challenge of the fee provision.

D. Three-Foot Buffer Zone

Chapter 6.54.140(C) also provides that "[a]ll performances . . . shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer." Plaintiffs' exhibit 5. The plaintiffs contend that this provision

violates the *O'Brien* test because it is content-specific and not narrowly tailored to serve the government's interest. The plaintiffs also contend that the buffer zone is vague because it does not indicate how three feet is to be measured. Finally, the plaintiffs contend that the buffer zone violates the First Amendment rights of customers and entertainers to freedom of association.

1. *content-neutral*

In the plaintiffs' view, the distance requirement is an attempt to ban dances, such as table or couch dances, that allow entertainers to convey a message of intimacy and eroticism through their proximity to the customer. Therefore, the plaintiffs contend that the buffer zone is a content-specific regulation and should be reviewed under strict scrutiny.[19]

The Court has found that the ordinance, including the buffer zone provision, was written primarily to combat the secondary effects of adult entertainment and is not subject to strict scrutiny. *Richland Bookmart*, 137 F.3d at 439.

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[19] In support of their contention that distance is a central part of the expressive content of erotic dances, the plaintiffs presented the expert testimony of Dr. Judith Lynne Hanna, a cultural anthropologist who studies messages conveyed by dance. Dr. Hanna testified that proximity is an integral component of erotic dance performances and conveys a message of intimacy. In addition, dancers testified at the hearing that in order to convey the message they intend with their performances, it is often important that they be able to whisper to the customer for whom they are performing. Dancers testified that if they are required to remain three feet from a customer, their ability to convey messages through such oral communication would be impossible because the loud music in the entertainment establishment would make whispers inaudible.

Accordingly, the Court will treat the buffer zone as a content-neutral time, place or manner regulation.

2. *narrowly tailored*

The plaintiffs contend that the buffer zone is not narrowly tailored to serve the government's interest in preventing sexual contact between entertainers and patrons. The plaintiffs rely on *Schenck v. Pro-Choice Network*, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed. 1 (1997), in which the Supreme Court held that an injunction prohibiting abortion protesters from coming within 15 feet of people entering and leaving abortion clinics was unconstitutional because it "burdened more speech than necessary to serve the relevant governmental interest." *Id.*, 519 U.S. at 377, 117 S.Ct. at 867, 137 L.Ed.2d at 21. The Court's decision was based on the conclusion that, because the buffer zone floated around the people coming to and from the clinic, it would be difficult for protesters to remain in compliance with it and for courts to enforce it. *Id.*, 519 U.S. at 379, 117 S.Ct. at 867, 137 L.Ed.2d at 21 and n.9. Additionally, the Court was concerned that due to the uncertainties caused by the fact that the zone floated, there was a substantial risk that more speech will be burdened than the injunction prohibits. *Id.*

Schenck is distinguishable from this case for several reasons. The buffer zone in this case differs from the one in *Schenck* in that the buffer zone in *Schenck* was truly a floating buffer zone which surrounded the clinic visitors as they came and went from the clinic. Chapter 6.54, however, requires that during their performances, entertainers are to remain on a stage eighteen inches above the ground and three feet from the nearest customer. Consequently,

the three-foot buffer zone is fixed by the parameters of the stage, even though it may partially float around performers within those parameters.

The Court's decision in *Schenck* was also based on the conclusion that it prevented protestors from talking to clinic visitors at a normal conversational level. The plaintiffs contend that the three-foot buffer zone in this case suffers from the same problem because performers will not be able to carry on conversations with customers during performances from three feet due to the loud music in the entertainment establishments.

This problem differs from the one in *Schenck* because performers are not prevented from speaking to customers at a normal level entirely because of the three-foot distance requirement. Instead, as the plaintiffs admit, they are hampered due to the volume of the music in the entertainment establishments. The noise level is a factor completely under the control of the entertainment establishments and has no bearing on the constitutionality of the buffer zone.[20]

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[20] *Schenck* is also distinguishable for other reasons. First, the Supreme Court determined that the "'standard time, place, and manner analysis is not sufficiently rigorous' when it comes to evaluating content neutral injunctions that restrict speech." *Schenck*, 519 U.S. at 385, 117 S.Ct. at 857, 137 L.Ed.2d at 17 (quoting *Madsen v. Women's Health Ctr. Inc.*, 512 U.S. 753, 765, 114 S.Ct. 2516, 2519, 129 L.Ed.2d 593, 593 (1994)). Second, the Court was concerned with political speech that "lie[s] at the heart of the First Amendment." *Schenck*, 519 U.S. at 358, 117 S.Ct. at 858, 137 L.Ed.2d at 21. Erotic expression, on the other hand, falls within the "outer parameters of the First Amendment." *Barnes*, 501 U.S. at 566, 111 S.Ct. at 2460, 115 L.Ed.2d at 511. Finally, the sidewalks in *Schenck* were the "prototypical example of a traditional public forum," and adult entertainment establishments are not.

(Continued on following page)

Accordingly, the Court finds that the Supreme Court's decision in *Schenck* that the buffer zone violated the protestor's free speech rights is not determinative with respect to the constitutionality of the buffer zone in Chapter 6.54.

The plaintiffs also argue that the same interest may be accomplished without the buffer zone through the prohibitions on sexual contact, caressing, fondling, or touching found in Chapter 6.54.140(A) and (B). A content-neutral regulation of expression designed to combat secondary effects such as the buffer zone in this case is not invalid because there is an "imaginable alternative that might be less burdensome on speech." *Ward,* 491 U.S. at 797, 109 S.Ct. at 2757, 105 L.Ed.2d at 679. Instead, if the regulation is not "substantially broader than necessary to achieve the government's interest," it will be upheld. *Id.* at 800, 109 S.Ct. at 2757, 105 L.Ed.2d at 681. In *DLS,* the Sixth Circuit determined that a six-foot buffer zone between patrons and entertainers in adult entertainment establishments was narrowly tailored to serve the city's interest in preventing contact between customers and entertainers, and thereby prevent crime and disease. *DLS,* 107 F.3d at 413. Noting that the buffer zone "will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative," such as a no-touch rule, the Sixth Circuit found that the buffer zone was narrowly tailored. *Id.* at 412 (citing *Ward,* 491 U.S. at 800, 109 S.Ct. at 2757-58, 105 L.Ed.2d at 681.).

Schenck, 519 U.S. at 358, 117 U.S. at 858, 137 L.Ed.2d at 21 (citations omitted).

Likewise, the Court finds that even though Chapter 6.54.140(A) and (B) prohibit sexual contact, caressing, fondling and touching, the three-foot buffer zone is narrowly tailored to serve the government's interest in preventing crime and sexual contact between entertainers and patrons. Accordingly, the Court finds that the plaintiffs are not likely to succeed in their challenge to Chapter 6.54.140(C) on the basis that the buffer zone is not narrowly tailored to serve the government's interest.

3. *economic impact*

The plaintiffs next contend that the buffer zone is unconstitutional because of the severity of the economic impact it will have upon adult entertainment establishments. Because of this impact, the plaintiffs contend that the erotic expression is, in effect, being driven from the marketplace of ideas in violation of the First Amendment.

In *DLS*, the Sixth Circuit considered whether the economic impact of ordinances regulating adult entertainment renders such ordinances unconstitutional under the First Amendment. *DLS,* 107 F.3d at 413. The Court found that if an ordinance were to "destroy the market for adult cabarets, it might run afoul of the First Amendment, but not merely if it had adverse effects on the individual theater." *Id.* (citation omitted). Consequently, the economic impact on individual establishments does not raise First Amendment concerns. The appropriate inquiry is whether the economic impact of an ordinance in the aggregate forecloses a "reasonable opportunity" to operate an adult cabaret. *Id.* (citing *Renton,* 475 U.S. at 54, 106 S.Ct. at 932, 819 L.Ed.2d at 42).

Deja Vu presented evidence that, because of the configuration of seats and stages in its Nashville club and Ken's Gold Club, a majority of the floor space in these establishments will not be useable for the seating of customers if the three-foot buffer zone is in effect.

The Court finds that this evidence only establishes that the ordinance will impose a hardship of an undeterminable degree upon an undeterminable number of cabarets. It does not establish that the buffer zone forecloses a reasonable opportunity to open and operate a cabaret in Nashville. The plaintiffs did not present any evidence that the ordinance will destroy the market for adult cabarets. Nor did the plaintiffs present evidence that a three-foot buffer zone had been responsible for the closing of any adult cabaret in other areas.[21]

The plaintiffs have failed to present sufficient evidence to establish that the buffer zone would foreclose reasonable opportunities to open and operate adult cabarets.

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[21] At the hearing on the plaintiffs' motions (Docket Entry Nos. 81 and 83), the plaintiffs presented the testimony of Mr. Paul Bern in an attempt to establish that the application of a three-foot buffer zone would destroy the economic viability of adult cabarets in Nashville. Mr. Bern testified that the imposition of a four-foot buffer zone in adult cabarets in Washington State caused one profitable cabaret to become unprofitable. The Court finds that this testimony does not establish that Chapter 6.54 will prevent adult cabarets in Nashville from being viable. First, Mr. Bern only testified to the effect of the Washington ordinance on one cabaret. Moreover, Mr. Bern did not testify that any adult cabarets had closed in Washington. Additionally, the Washington ordinance contained other restrictions in addition to the buffer zone, including a lighting requirement, that could have caused the negative impact on the cabaret. *See Ino Ino, Inc. v City of Belleview,* 937 P.2d 154, 171 (Wash. 1997). Accordingly, the Court finds that this evidence does not establish a likelihood of a similar effect due to the three-foot buffer zone in Chapter 6.54.

Accordingly, the Court finds that the plaintiffs are not likely to succeed on the merits of their challenge to Chapter 6.54.140(C) on the basis that the economic impact of the buffer zone causes it to be unconstitutional.

4. *freedom of association*

The plaintiffs contend that when an entertainer performs for a customer, they are engaging in private or intimate association and expressive association protected by the First Amendment which will be hampered by the buffer zone. Accordingly, the plaintiffs contend that the constitutionality of the buffer zone should be reviewed under strict scrutiny.

Our First Amendment jurisprudence has recognized private or intimate association and expressive association:

> In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion.

Dallas v. Stanglin, 490 U.S. 19, 24, 109 S.Ct. 1591, 1594, 104 L.Ed.2d 18, 25 (1989) (quoting *Roberts v. United States Jaycees,* 468 U.S. 609, 617-18, 104 S.Ct. 3244, 3249, 82 L.Ed.2d 462, 471 (1984)). Those relationships that

presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life" are protected by the First Amendment as intimate relationships. *Roberts,* 468 U.S. at 619-620, 104 S.Ct. at 3250, 82 L.Ed.2d. at 472. In order to determine whether a relationship may be protected under the First Amendment as intimate association, the Court may look at such factors as the number of people in the relationship, its purpose, policies, selectivity, and congeniality, as well as other relevant characteristics. *Id.*, 468 U.S. at 620, 104 S.Ct. at 3251, 82 L.Ed.2d at 472-73. Expressive association is protected to ensure that individuals who are pursuing the same or similar "political, social, economic, educational, religious, and cultural ends" may associate with each other. *Id.*, 468 U.S. at 622, 104 S.Ct. at 3252, 82 L.Ed.2d. at 472.

With respect to whether the contact between entertainers in adult cabarets and customers rises to the level of intimate association, performers entertain individuals who are willing to pay admission to the cabaret and a tip. Therefore, the association is not selective. Additionally, the customers generally view performances in the presence of all the other customers rather that in secluded areas. Therefore, even though the contact may be sexual in nature, it is not intimate. Accordingly, the Court finds that the association between entertainers and customers does not rise to the level of intimate association protected by the First Amendment.

With respect to whether the entertainment rises to the level of expressive association protected by the First Amendment, the Court finds that the entertainers and

customers in adult entertainment establishments do not associate in order to pursue "political, social, economic, educational, religious, and cultural ends." *Roberts,* 468 U.S. at 622, 104 S.Ct. at 3252, 82 L.Ed.2d. at 474. Accordingly, the Court finds that the association between entertainers and customers does not rise to the level of expressive association protected by the First Amendment.

As the Court has determined that customers and entertainers are not engaged in either intimate or expressive association, the Court finds that the plaintiffs are not likely to succeed on the merits of their challenge to Chapter 6.54.140(C) on the basis that the buffer zone impermissibly interferes with their First Amendment right to freedom of expression.

5. *vagueness*

Finally, the plaintiffs contend that the buffer zone is impermissibly vague because it fails to provide any guidance as to how the three-foot distance requirement is to be measured.[22] The defendants contend that there is not a substantial likelihood that the plaintiffs will be successful in their vagueness claim because in *DLS*, 107 F.3d at 411, the Sixth Circuit upheld an ordinance establishing a similar six-foot buffer zone. The defendants further contend that the ordinance is not vague because "three feet" is a common and understandable term.

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[22] At the hearing on the plaintiffs' motions, the plaintiffs demonstrated that whether the measurement is taken from the place where the nearest customer is standing or from the place where the nearest customer could reach may determine whether the customer will be able to hand the entertainer money while she is on stage performing.

The Court finds that the Sixth Circuit's holding in DLS that a six-foot buffer zone was constitutional is not indicative of the plaintiffs' likelihood of success on the merits as the plaintiffs in *DLS* failed to challenge the buffer zone provision in that case as unconstitutionally vague. Based on the "words of the ordinance itself," the Court agrees that the ordinance does not provide any guidance with respect to how three feet is to be measured. *Grayned,* 408 U.S. at 110, 92 S.Ct. at 2300, 33 L.Ed.2d at 228. As for "the interpretation of the [ordinance] given by those charged with enforcing it," Charles Watkins, the Sexually Oriented Business Inspector, testified during the hearing of the plaintiffs' motions that he was did not know how three feet would be measured. *Id.*

However, in determining whether a law regulating expressive activity is vague, courts do not require "perfect clarity and precise guidance." *Ward,* 491 U.S. at 794, 108 S.Ct. at 2755, 105 L.Ed.2d at 677 (citing *Grayned,* 408 U.S. at 110, 92 S.Ct. at 2300, 33 L.Ed.2d at 228-229 for the proposition that "we can never expect mathematical certainty in our language."). Although the standard for measuring three feet is "undoubtedly flexible, and the officials implementing [it] will exercise considerable discretion," the Court finds that the buffer zone is not unconstitutionally vague. *Id.* Accordingly, the Court finds that the plaintiffs are not likely to succeed on the merits of their challenge to Chapter 6.54.140(C) on the basis that the buffer zone is impermissibly vague.

E. Prohibition Against Physical Contact

Chapter 6.54.140(C) states that "[n]o customer shall be permitted to have any physical contact with any

entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment." Plaintiffs' exhibit 5. The plaintiffs challenge this provision as overbroad because it prohibits incidental, unintentional, benign, or non-sexual contact between customers and entertainers.

In support of this assertion, the plaintiffs cite *Threesome Entertainment v. Strittmather*, 4 F. Supp. 719, 722-23 (N.D. Ohio 1988). In *Strittmather*, a similar no-touch provision was found to be unconstitutional because it lacked a mens rea requirement. However, the prohibition against touching in that case is distinguishable from the no-touch provision in Chapter 6.54 in that it provides criminal penalties.

Moreover, in order to be considered overbroad, a law must substantially threaten the exercise of First Amendment rights. *Ferber*, 458 U.S. at 770, 102 S.Ct. at 3361, 73 L.Ed.2d at 1131. However, even if dancers remain a greater distance from customers while performing than they might if the law prohibited only intentional touching, the increased distance will not substantially threaten the exercise of their First Amendment right by significantly changing the message of their performance. *See KEV, Inc. v. Kitsap County*, 793 F.3d 1053, 1061 (1986). Furthermore, the Court finds that performances are unlikely to be affected by the no-touch provision in light of the fact that the performers are required to remain three feet from the nearest customer while performing under the buffer zone provision in the ordinance. Accordingly, the Court finds that there is not a substantial likelihood that the plaintiffs will he successful on their overbreath challenge of the no-touch provision in Chapter 6.54.140(C).

F. Hours of Operation

Chapter 6.54.120(A) requires that "[a]ll sexually oriented businesses shall be closed between the hours of three a.m. and eight a.m. Monday through Saturday and between the hours of three a.m. and twelve noon on Sundays." Plaintiffs' exhibit 5. The plaintiffs contend that this provision does not further a substantial government interest, and therefore, fails the second prong of the *O'Brien* test. *Barnes*, 501 U.S. at 567, 111 S.Ct. at 2460, 115 L.Ed. 2d at 512. The plaintiffs further contend that because this restriction only applies to businesses protected by the First Amendment, it violates the Equal Protection Clause of the Fourteenth Amendment. The defendants contend that the Court should deny the plaintiffs' motion with respect to this challenge because the same restriction was upheld by this Court in *Ellwest*, 718 F. Supp. at 1577, and a similar restriction was upheld by the Sixth Circuit in *Richland Bookmart*, 137 F.3d at 43.

The Court has found that reducing crime and the spread of sexually transmitted diseases is an important or substantial government interest. The preamble to Chapter 6.54 does not contain any information distinguishing the early morning hours from other hours with respect to the secondary effects of adult entertainment establishments. However, "[i]t is not unreasonable to believe that such regulation of hours of [adult entertainment establishments] would tend to deter prostitution" and other crimes. *Richland Bookmart*, 137 F.3d at 440-41. Moreover, adult entertainment establishments are only required to close 5 hours a day on weekdays and nine hours on Sunday. This is a minor infringement upon activity protected by the First Amendment. *Ellwest*, 718 F. Supp. at 1577. Accordingly, the Court finds that the hours of

operation restriction is a valid time, place, or manner regulation.

In support of the plaintiffs' challenge under the Equal Protection Clause of the Fourteenth Amendment, the plaintiffs contend that patrons of adult entertainment establishments have a fundamental right to visit adult establishments during the hours the ordinance requires those establishments to be closed. Therefore, the plaintiffs argue that the Court should review the constitutionality of the hours of operation provision under strict scrutiny.

Heightened scrutiny is not the appropriate level of scrutiny for regulations challenged as violating the Equal Protection Clause unless a government regulation utilizes "a classification [that] warrants some form of heightened review because it jeopardizes [the] exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic." *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1, 12 (1992). If not, "the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Id.*

The Court finds that there is no fundamental interest in attending adult entertainment establishments during the hours in which the ordinance requires them to be closed. Nor does the hours of operation provision categorize patrons of adult entertainment establishments or adult entertainments on the basis of an "inherently suspect characteristic." *Id.* Accordingly, review of the hours of operation provision under heightened scrutiny is not appropriate based on the plaintiffs' challenge. The Court has found that the hours of operation provision furthers an important or substantial government interest. Therefore,

the hours of operation provision is also rationally related to a legitimate state interest. Accordingly, the Court finds that the plaintiffs are not likely to succeed on their challenges to Chapter 6.54.120(A) as an unconstitutional regulation under the First Amendment or Equal Protection Clause of the Fourteenth Amendment.

G. Definitions

1. *sexually oriented*

Chapter 6.54.010(X) defines "sexually oriented" as:

> any exhibition of any motion pictures, films or videos depicting "specified sexual activities" or "specified anatomical areas" or any live performance, display or dance of any type, removal of articles of clothing or appearing unclothed, pantomime, modeling, or any other personal service offered customers a significant or substantial portion of which depicts any actual or simulated performance of "specified sexual activities" or exhibition and viewing of "specified anatomical areas."[23]

Plaintiffs' exhibit 5.

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[23] Chapter 6.54.010(BB) defines "specified sexual activities" as: "(1) human genitals in a state of sexual stimulation or arousal; (2) acts of human masturbation, sexual intercourse, or sodomy; (3) fondling or erotic touching of human genitals, pubic region, buttock, or female breasts." Chapter 6.54.101(AA) defines "specified anatomical areas" as "(1) less than completely and opaquely covered: a. human genitals, pubic region, b. buttocks, c. female breasts below a point immediately above the top of the areola; and (2) human male genitals in a discernibly turgid state, even if completely opaquely covered." Plaintiffs' exhibit 5.

The plaintiffs contend that this definition is vague and overbroad as it potentially applies to a vast range of expression and entertainment that do not cause the type of secondary effects at which the ordinance is aimed.

The Court agrees that the term "sexually oriented" is overbroad as it could apply to the exhibition of any film, video, or movie, even if it were not the type typically considered to be adult oriented, providing that it depicts "[l]ess than completely and opaquely covered" buttocks or female breasts as stated in Chapter 6.54.010(AA). Therefore, this definition does not limit sexually oriented films, videos, or movies to those which are distinguished by their emphasis on such depictions. Under this definition, PG or R-rated movies containing such depictions could also fall within the purview of the statute despite the fact that they are not the type of movies that cause the kind of secondary effects at which Chapter 6.54 is aimed. Consequently, the definition of "sexually oriented" "reaches a substantial number of impermissible applications." *Ferber*, 458 U.S. at 771, 102 S.Ct. at 3362, 73 L.Ed.2d. at 1132. Accordingly, the Court finds that the plaintiffs are likely to succeed on their overbreath challenge to the definition of "sexually oriented" in Chapter 6.54.010(X).

2. *sexually oriented bookstore and sexually oriented video store*

A "sexually oriented bookstore" is defined in Chapter 6.54.010(Y)(1) as:

> an establishment having a *majority of its stock in trade or a majority of its floor space* in books, magazines, other periodicals, or any other items which are *distinguished or characterized by their*

> *emphasis* on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation of the patrons therein; or in conjunction therewith has facilities for the presentation of sexually oriented entertainment, including but not limited to sexually oriented movies, sexually oriented videos, sexually oriented films, or sexually oriented live entertainment, for observation by patrons therein.

Plaintiffs' exhibit 5. (emphasis added).

Chapter 6.54.010(Y)(4) defines sexually "oriented video store" as:

> a commercial establishment having *a majority of its stock or a majority of its floor space* dedicated to "sexually oriented videos," as defined in this section, which are rented or sold or presented for a fee or incidentally to another service; or in conjunction therewith, regularly presents on the premises sexually oriented motion pictures or sexually oriented films, "sexually oriented videos," or sexually oriented live exhibitions which are *distinguished or characterized by an emphasis* on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observance by patrons therein.

Id. (emphasis added).

The plaintiffs assert that these definitions are unconstitutionally vague because the phrase "majority of stock" and "majority of its floor space" is vague.

In *Richland Bookmart*, the Sixth Circuit considered a vagueness challenge to a regulation of sexually oriented

bookstores that defined the bookstores as those having their "principal or predominant stock or trade" in sexually oriented materials, devices or paraphernalia. *Richland Bookmart*, 137 F.3d at 441. The Court rejected this challenge, finding that terms used in the definition were "understandable common terms." *Id.*

Likewise, the Court finds that the terms "majority of stock" and "majority of its floor space" are sufficiently clear to provide notice to bookstores and video stores that fall within the purview of the ordinance. Accordingly, the Court finds that the plaintiffs are not likely to succeed on their vagueness challenge to the definitions of "sexually oriented bookstore" and "sexually oriented video store."

The plaintiffs also challenge these definitions as overbroad. In order to fall under the definition of a "sexually oriented bookstore," a store must have a majority of its stock in materials "distinguished or characterized by their emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas.'" Chapter 6.54.010(Y). Additionally, in order to fall under the definition of a "sexually oriented video store," a store must have a majority of its stock of floor space in "sexually oriented videos." Such videos are narrowly defined in Chapter 6.54.010(Y)(4)(a) as those with a cover that depicts "specified sexual activities" or "specified anatomical areas." Accordingly, the Court finds that the plaintiffs are not likely to succeed on their claim that the definitions of "sexually oriented bookstore" and "sexually oriented video store" are overbroad.

Chapter 6.54.010(Y)(2) defines "sexually oriented nightclub" to mean:

> a theater, concert hall, auditorium, nightclub, bar, restaurant, or similar commercial establishment which *regularly* features live performances that are *characterized* by any actual or simulated performance of "specified sexual activities" or the exposure of "specified anatomical areas," as defined in this section.

Plaintiffs' exhibit 5 (emphasis added).

Chapter 6.54.010(Y)(3) defines "sexually oriented theater" to mean:

> an enclosed building *regularly* used for presenting films, motion pictures, videocassettes, slides, or other photographic reproductions or other material *depicting, describing or relating* to "specified sexual activities" or "specified anatomical areas," as defined in this section, for observation by patrons therein.

Id. (emphasis added).

Chapter 6.54.010(Z) defines "sexually oriented entertainment" to mean:

> the *regular* presentation, for a fee or incidentally [sic] to another service, of material or exhibitions *distinguished or characterized by an emphasis* on matter depicting or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

Id. (emphasis added).

The plaintiffs contend that the definitions of "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented entertainment," are impermissibly vague in that there is no limitation on the scope of the

interpretation of the term "regularly" featured, used, or presented.

The Court finds that there is no "real and substantial ambiguity" in the term "regular." *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1210 (5th Cir. 1982) (denying the plaintiff's vagueness challenge to a city zoning ordinance which restricted the operation of adult theaters on the basis that it was unclear what it meant to show adult films on a "regular basis"). In the case of *FW/PBS*, an ordinance regulated adult theaters and cabarets that regularly provided nudity, sexually explicit depictions, or descriptions. *FW/PBS*, 493 U.S. at 254, 110 S.Ct. at 619-20, 107 L.Ed.2d at 636-37. The plaintiffs challenged the term "regularly" as vague. Justice Scalia concluded that the term "regularly" in this context "can reasonably be interpreted to mean a continuous presentation of the sexual material as one of the very objectives of the commercial enterprise." *Id.*, (Scalia, J., concurring in part and dissenting in part). The same is true with respect to the term "regularly" as it is used in Chapter 6.54. Accordingly, the Court finds that the plaintiffs are not likely to succeed on their challenge to the terms "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented entertainment" on the basis that the term "regularly" is vague.

Further, the plaintiffs contend that as the terms "sexually oriented nightclubs," "sexually oriented entertainment" and "sexually oriented theater" are overbroad as they are defined in the ordinance. The Court finds that, because the terms "sexually oriented nightclubs" and "sexually oriented entertainment" are limited to those that have regular presentations or performances characterized or distinguished by the inclusion of "specified sexual

activities" or the exposure of "specified anatomical areas," the plaintiffs are not likely to succeed on their challenge that these definitions are overbroad.

However, the definition of "sexually oriented theater" could include those theaters which regularly present films, motion pictures, and videocassettes which merely depict "specified sexual activities" or "specified anatomical areas." It does not limit the theaters to those that show films, motions pictures, and videocassettes that are distinguished or characterized by such depictions. Consequently, this definition includes a vast number of theaters which show, for instance, PG or R-rated movies containing such depictions, but which would not cause the kinds of secondary effects at which Chapter 6.54 is aimed. Therefore, the definition of "sexually oriented theater" "reaches a substantial number of impermissible applications." *Ferber*, 458 U.S. at 771, 102 S.Ct. at 3362, 73 L.Ed.2d at 1132. Accordingly, the plaintiffs are likely to succeed on their overbreath challenge to the definition of "sexually oriented theater" in Chapter 6.54.010(Y)(2).

H. Booth Regulation

Chapter 6.54.050 of the ordinance sets forth certain construction standards and regulatory provisions concerning any "booth" for the "viewing of any sexually oriented entertainment, including but not limited to sexually oriented films, sexually oriented movies, sexually oriented videos." Plaintiffs' exhibit 5. The plaintiffs contend that the booth regulations are overbroad because they apply to businesses and forms of entertainment that do not cause the types of secondary effects at which Chapter 6.54 is aimed.

The term "sexually oriented video" has been narrowly defined as those that depict specified sexually activities or specified anatomical areas on its cover. Therefore, the definition of "sexually oriented video" does not reach a "substantial number of impermissible applications." *Ferber*, 458 U.S. at 771, 102 S.Ct. at 3362, 73 L.Ed 2d at 1132. As set forth above, the term "sexually oriented" is substantially overbroad as it applies to films and movies. However, the plaintiffs have not established that there are a substantial number of circumstances in which films and movies to which the term "sexually oriented" impermissibly applies are shown in the types of booths that Chapter 6.54 seeks to regulate. Therefore, the plaintiffs have not established that the booth requirement is overbroad because it "reaches a substantial number of impermissible applications." *Id.* Accordingly, the Court finds that the plaintiffs are not likely to succeed on their overbreath challenge to the booth requirements in Chapter 6.54.050.

I. Revocation and Suspension Provisions

Chapter 6.54.150(A)(9) states that the board shall revoke a license if "[t]he licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing continuing violations of Chapter 6.54." Plaintiffs' exhibit 5. Chapter 6.54.150(B)(1) states that the board shall either fine, suspend or fine and suspend a license if "[t]he licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing a violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030." *Id.*

The plaintiffs contend that this provision is impermissibly vague because it does not provide sufficient guidance

as to what constitutes a "sanitary and safe condition." The Court finds that in order for the board to revoke, suspend, and/or fine a licensee under these sections, the licensee must be in violation of Chapter 6.54, Metropolitan Code § 7.24.030, or Tennessee Code Annotated, § 57-4-204. Because the Metropolitan Code, § 7.24.030, Tennessee Code Annotated, § 57-4-204, and Chapter 6.54, all contain standards for determining whether a business is in compliance with them, the Court finds that the plaintiffs are not likely to succeed on their challenge to Chapters 6.54.150(A)(9) and 6.54.150(B)(1) as, impermissibly vague.

J. Severability

Chapter 6.54.170 states:

> Should any court of competent jurisdiction declare any section, clause or provision of this chapter to be unconstitutional, or any other ordinance of the metropolitan government unconstitutional, such decision shall affect only such section, clause, provision or ordinance so declared unconstitutional, and shall not affect any other section, clause or provision of this chapter.

Plaintiffs' exhibit 5.

When legislation contains a severance clause, "[i]t is the duty of the courts to give effect to a severability clause and to make an elision, so as not to invalidate an entire act" "unless observance thereof would frustrate the dominant legislative intent." *Moore v. Fowinkle*, 512 F.2d 629, 632 (6th Cir. 1975) (citations omitted). Moreover, if severing the unconstitutional provisions of an act would cause it to be essentially meaningless, the Court should not give

effect to the severability clause. *Ellwest*, 718 F. Supp. at 1581.

IV.

As set forth above, the Court finds that the plaintiffs have made the required showing of a substantial likelihood of success on the merits that numerous provisions of Chapter 6.54 are unconstitutional as violations of the First or Fourteenth Amendments to the United States Constitution. If the Court were to give effect to the severability clause, the remaining provisions would frustrate the dominant legislative intent of the ordinance. Accordingly, a preliminary injunction will issue against the defendants. The defendants shall be enjoined from enforcing Chapter 6.54, in its entirety, pending the adjudication of these cases on the merits and entry of a final judgment.

An appropriate order shall be entered.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Court
10-1-99/

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.	]	
	]	
v.	]	No. 3-97-1066
	]	No. 3-97-1176
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.	]	Judge Higgins

ORDER

In accordance with the memorandum contemporaneously entered, the plaintiffs' motions (filed December 17, 1998; Docket Entry Nos., 81 and 83) for a preliminary injunction are granted.[1]

Accordingly, the defendants are enjoined from enforcing Chapter 6.54 of the Metropolitan Code, pending the adjudication of these cases on the merits and entry of a final judgment.

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Court
10-1-99/

[1] The plaintiffs' motion (filed June 15, 1999; Docket Entry No. 165) to strike the defendants' notice of filing (filed June 7, 1999; Docket Entry No. 157) is granted insofar as the notice relates to the plaintiffs' second motions (Docket Entry Nos. 81 and 83) for preliminary injunction. However, the plaintiffs' motion is denied in all other respects.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al.	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE et al.	No. 3-97-1066 No. 3-97-1176 Judge Higgins

ORDER

(Entered December 23, 1999)

In this action, as stated on the record at the hearing on December 21, 1999, it appears that no further or additional relief is sought beyond that which has been granted by the preliminary injunction.[1,2]

The preliminary injunction heretofore issued is herewith made a permanent injunction.

Accordingly, the defendants are permanently enjoined from enforcing Chapter 6.54 of the Metropolitan Code.

The applications for interim attorneys' fees shall be deemed final applications for fees in favor of the prevailing

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[1] See memorandum and order (entered October 4, 1999; Docket Entry Nos. 188-189) granting motions for preliminary injunction.

[2] There is no claim by the plaintiffs for money damages under 42 U.S.C. § 1983. Applications for interim attorneys' fees are now pending before the Magistrate Judge.

parties as of the conclusion of this litigation by the entry of this order.

The entry of this order shall constitute the final judgment in this action.[3]

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District
Judge 12-21-99

[3] The plaintiffs' motion to show cause (filed June 15, 1999; Docket Entry No. 167) is denied in its entirety. The defendants' motion (filed July 2, 1999; docket Entry No. 175) to strike is denied as moot. The plaintiffs' motion (filed June 15, 1999; Docket Entry No. 165) to strike is denied as moot.

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.	
v.	No. 3-97-1066 No. 3-97-1176
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.	Judge Higgins

ORDER

(Filed May 26, 2000)

The defendants' motion[4] (filed May 5, 2000; Docket Entry No. 224) to vacate or dissolve injunction under Rule 60(b) is denied because the Court is without jurisdiction in view of the filing of a notice of appeal.

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge
5-23-00

[4] *See also* the defendants' memorandum (Docket Entry No. 225) in support of the motion and plaintiffs' response (Docket Entry No. 226) in opposition to the motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, et al.	)	
v.	)	NO. 3:97-1066
	)	JUDGE CAMPBELL
METROPOLITAN GOVERNMENT of NASHVILLE/ DAVIDSON COUNTY	)	CONSOLIDATED CASES

ORDER

(Entered April 4, 2005)

Pending before the Court, among other things, is Plaintiffs' Motion for Oral Argument on Defendant's Motion to Dissolve Injunction (Docket No. 301). Plaintiffs' Motion is GRANTED, and the Court will hear oral argument on Defendant's Motion to Dissolve Injunction (Docket No. 294) on Friday, April 8, 2005, at 9:00 a.m.

IT IS SO ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, et al.	)	
v.	)	NO. 3:97-1066
	)	JUDGE CAMPBELL
METROPOLITAN GOVERNMENT of NASHVILLE/ DAVIDSON COUNTY	)	CONSOLIDATED CASES

ORDER

(Entered April 5, 2005)

Pending before the Court, among other things, is Defendant's Motion to Continue Hearing and Motion for Leave to File a Reply. Defendant's Motion is GRANTED in part and DENIED in part.

The hearing previously set for Friday, April 8, 2005, at 9:00 a.m. is canceled.

Defendant shall file its Reply Brief on or before April 22, 2005. No further briefing will be allowed, absent leave of the Court.

IT IS SO ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, et al.	)	
v.	)	NO. 3:97-1066
METROPOLITAN GOVERNMENT of NASHVILLE/DAVIDSON COUNTY	)	JUDGE CAMPBELL CONSOLIDATED CASES

ORDER

(Entered April 27, 2005)

Pending before the Court is a Motion to Dissolve the Injunction (Docket No. 294), filed by the Metropolitan Government of Nashville and Davidson County ("Metro"). Plaintiffs have filed a Response (Docket No. 305) in opposition.

Metro's Motion is GRANTED, and the injunction previously entered in this case (Docket No. 199) is dissolved.

Pursuant to request from Metro, the effective date of this Order shall be August 1, 2005, in order to allow sexually oriented businesses and entertainers sufficient time to comply with the requirements of Chapter 6.54 of the Metropolitan Code of Laws.

All matters having been ruled upon, the case is dismissed and the Clerk is directed to close the file.

IT IS SO ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, et al.	)	
v.	)	NO. 3:97-1066
METROPOLITAN GOVERNMENT of NASHVILLE/DAVIDSON COUNTY	)	JUDGE CAMPBELL CONSOLIDATED CASES

MEMORANDUM

(Entered April 27, 2005)

Pending before the Court is a Motion to Dissolve Injunction (Docket No. 294), filed by the Metropolitan Government of Nashville and Davidson County ("Metro"). Plaintiffs have filed a Response (Docket No. 305) in opposition. For the reasons stated herein, the Motion is GRANTED.

Metro seeks to dissolve an injunction issued on December 23, 1999, enjoining enforcement of Chapter 6.54 of the Metropolitan Code of Laws. Docket No. 189. Metro has presented evidence that both the facts and the law have changed since entry of that injunction, justifying its dissolution.

The Order enjoining the ordinance at issue was appealed to the Sixth Circuit Court of Appeals, which, in a published opinion, affirmed it in part and reversed it in part. Relevant to the decision on Metro's Motion to Dissolve Injunction, the Sixth Circuit held: "Upon remand, the district court should maintain the injunction until

Metropolitan Nashville satisfies it that the constitutional problems with the Ordinance's definition of 'sexually oriented' and its judicial review procedures have been corrected." *Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville and Davidson County, Tennessee,* 274 F.3d 377, 403 (6th Cir. 2001).[1] The issue before this Court is whether Metro has made a satisfactory showing in that regard. After remand from the Sixth Circuit, this case was reassigned to the undersigned District Judge by Order (Docket No. 251) entered on May 16, 2002.

DEFINITION OF "SEXUALLY ORIENTED"

With regard to the definition of "sexually oriented" found to be unconstitutional, Metro has presented evidence that the ordinance has been amended to eliminate the potential overbreath found to be unconstitutional by the Sixth Circuit. The current ordinance defines "sexually oriented" as follows:

> "Sexually oriented" when used to modify film, movie, motion picture, videocassette, slides, or other photographic reproductions shall mean a film, movie, motion picture, videocassette, slides, or other photographic reproductions that regularly depicts material which is distinguished or characterized by an emphasis on matter depicting or describing "specified sexual activities or specified anatomical areas" offered for observation by the patron(s) on the premises of a sexually oriented business.

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[1] This dictate from the Sixth Circuit makes Plaintiffs' Rule 60 argument meritless.

Metro Code of Laws, § 6.54.010(Y) (attached to Docket No. 294 as Ex. A).

The Sixth Circuit found the former definition of " sexually oriented" to be overbroad because it could apply to a range of expression that does not cause the secondary effects that the ordinance was aimed to prevent. *Deja Vu*, 274 F.3d at 388. A law is overbroad under the First Amendment if it reaches a substantial number of impermissible applications relative to the law's legitimate sweep. *Id.* at 387.

This Court finds that the amended definition is not overbroad and complies with the First Amendment. It no longer applies to just *any* film, movie, motion picture, etc., but rather only to those which "regularly depict material which is distinguished or characterized by an emphasis on matter depicting or describing 'specified sexual activities or specified anatomical areas' offered for observation by the patron(s) on the premises of a sexually oriented business."

The Court further finds that the amended definition has eliminated the potential for reaching a substantial number of impermissible applications by its restrictions that the subject media be "on the premises of a sexually oriented business," and "regularly depict" material with "an emphasis on" the specified sexual activities or specified anatomical areas defined elsewhere in the ordinance.

For these reasons, Metro has satisfied the Court that the constitutional problems with the ordinance's definition of "sexually oriented" have been corrected.[2]

JUDICIAL REVIEW PROCEDURES

As for the sufficiency of its judicial review procedures, Metro argues both that the judicial review procedures have been changed and that the law as to what is required has changed.

The Sixth Circuit found that the judicial review procedures in effect at the time of the injunction provided no assurance of prompt judicial review because there was no affirmative evidence showing that every writ of certiorari would be granted. *Deja Vu,* 274 F.3d at 402. The court held that because the ordinance's judicial review procedures did not guarantee prompt judicial review as required by the First Amendment, those procedures were facially[3] unconstitutional. *Id.* at 402-403.

The judicial review procedures provided by Tennessee law have since changed. The relevant statute now provides:

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the

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[2] The Sixth Circuit also noted that the phrase "sexually oriented" is "never used but in conjunction with some other word that has its own definition" and is "apparently meaningless." *Deja Vu*, 274 F.3d at 389. Thus, "sexually oriented" can "easily be severed" in any event. *Id.*

[3] Plaintiffs' assertion that the constitutionality of the ordinance herein was decided on a case-by-case basis is wrong.

> respondent requests an expedited hearing, the court *shall immediately grant* the writ of certiorari, and *shall hear the matter and issue its decision* within forty (40) days of the court granting the writ of certiorari.

Tenn. Code Ann. § 27-9-111(e) (emphasis added).

The Court finds that this amended, mandatory[4] language does guarantee prompt judicial review as required by the First Amendment. The statute is sufficient "affirmative evidence" that every writ of certiorari concerning protected speech will be granted. Accordingly, Metro has satisfied this Court that the constitutional problems with its judicial review procedures have been corrected.[5]

Even if the amended ordinance did not specifically guarantee prompt judicial review, which it does, Metro argues that it is sufficient to withstand constitutional muster under the recent case of *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 124 S.Ct. 2219 (2004). In that case, the Supreme Court held that Colorado's ordinary judicial review procedures suffice to protect First Amendment judicial review rights, so long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly. *Id.* at 2224. Specifically, the Court stated "we have no reason to doubt the willingness of Colorado's judges to exercise these powers wisely so as to avoid serious threats of delay-induced First

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[4] Plaintiffs' contention that the statute is discretionary has no merit.

[5] It is also clear that the statute was amended specifically to comply with the Sixth Circuit's opinion in this case, as reflected in 2002 Pub. Acts, c. 615, § 2 regarding the effective date.

Amendment harm. We presume that courts are aware of the constitutional need to avoid 'undue delay result[ing] in the unconstitutional suppression of protected speech.'" *Id.* at 2225.[6]

In addition, the Supreme Court held that where the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria[7] and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision in the first place. *Id.* at 2226. The Court need not decide whether *Z.J. Gifts* dictates the result in this case, since the amended ordinance guarantees prompt judicial review.

For these reasons, the Court is satisfied that the previously-determined unconstitutional deficiencies in Metro's judicial review procedures in this case have been corrected, and that the amended statute provides the required First Amendment protections. Metro's Motion to Dissolve the Injunction is GRANTED.

FURTHER LITIGATION

Plaintiffs argue that dissolution of the injunction should not end this litigation because the injunction hearing was never consolidated with a trial on the merits.

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[6] "Colorado's rules provide for a flexible system of review in which judges can reach a decision promptly in the ordinary case, while using their judicial power to prevent significant harm to First Amendment interests where circumstances require." *Z.J. Gifts* at 2226. Metro argues the same presumption should be afforded Tennessee's rules and courts.

[7] The Court does not use the words "objective" or "subjective" as suggested by the Plaintiffs.

Judge Higgins' Order of December 23, 1999, provides otherwise. That Order states:

> In this action, as stated on the record at the hearing on December 21, 1999, it appears that no further or additional relief is sought beyond that which has been granted by the preliminary injunction.
>
> The preliminary injunction heretofore issued is herewith made a permanent injunction.
>
> . . .
>
> The entry of this order shall constitute the final judgment in this action.

Docket No.199.

In addition, as Metro points out, Magistrate Griffin specifically ordered the Plaintiffs to file (within ten days of any order granting Defendants' prior Motion to Dissolve Preliminary Injunction) a supplemental motion for preliminary injunction, "in which all issues upon which the plaintiffs relies (sic) in this case shall be raised. In other words, the plaintiffs shall not piecemeal motions for preliminary injunction but shall raise all grounds in support of a motion for preliminary injunction at one time." Docket No. 61. That "supplemental" motion (Docket No. 83) was granted by Judge Higgins (Docket No. 188), appealed to the Sixth Circuit (Docket No. 208), affirmed in part and reversed in part (274 F.3d. 377), and is the subject of the pending Motion to Dissolve Injunction. All issues upon which the Plaintiffs rely in this case should

have been raised.[8] Indeed, the Sixth Circuit found that Plaintiffs raised "all of their constitutional challenges to the Ordinance." *Deja Vu,* 274 F.3d at 386.[9]

TODD J. CAMPBELL

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[8] The Court cannot and will not revisit other substantive rulings previously made herein.

[9] Plaintiffs also argue there is a pending Motion for Review of the Magistrate Judge's Order. The only pending motion in this case is this Motion to Dissolve the Injunction. All other motions were termed when the judgment was made final (Docket No. 199) and appealed.

To the extent Plaintiffs seek to raise new matters arising after the Sixth Circuit's opinion, or related to new ordinance provisions, they should file a new case.

Plaintiffs also argue that various state constitutional issues are pending. The Court disagrees for the reasons stated above, but in any event declines supplemental jurisdiction over any state law claims. 28 U.S.C. § 1367(c).

Case No: 05-5895

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

(Filed Nov. 3, 2006)

DEJA VU OF NASHVILLE, INC et al,

Plaintiffs-Appellants

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

Defendant-Appellee

BEFORE: MARTIN, MOORE, and ROGERS, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellants,

And further considering the amended opinion entered by this Court on October 12, 2006,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk